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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 723

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

NATIONAL GROCERY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1938
CERTIORARI GRANTED FEBRUARY 28, 1938

SUPREME COURT OF THE UNITED STATES

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NATIONAL GROCERY COMPANY

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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Docket Entries.

United States Circuit Court of Appeals

THIRD CIRCUIT.

NATIONAL GROCERY COMPANY, Petitioner, *vs.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	DOCKET No. 76600.

Appearances:

For Petitioner: John M. Enright, Esq., James D. Carpenter, Jr., Esq.

For Respondent: Ralph E. Smith, Esq., Timothy C. Mooney, Esq.

1934

June 8—Petition received and filed. Taxpayer notified. (Fee paid.)

June 8—Copy of petition served on General Counsel.

June 27—Answer filed by General Counsel.

July 5—Copy of answer served on taxpayer.

Nov. 16—Motion to place on New York Calendar filed by taxpayer.

Nov. 19—Order placing on Circuit Calendar for hearing in New York City entered.

1936

Mar. 5—Hearing set May 7, 1936, New York, N. Y.

May 7—Hearing had before Mr. Smith on merits—submitted. Notice of appearance of Mr. Carpenter filed. Petitioner's brief due 6/22/36—respondent's brief due 7/8/36—petitioner's reply 7/23/36.

May 18—Transcript of hearing of May 7, 1936 filed.

July 10—Motion for leave to file brief filed by taxpayer—brief attached. 7/11/36 granted.

July 11—Brief filed by taxpayer.

July 13—Copy of motion and brief served on General Counsel.

Sept. 12—Motion for leave to file brief filed by General Counsel—brief lodged. 9/14/36 granted.

Oct. 26—Motion for leave to file reply brief filed by taxpayer. 10/26/36 granted.
Oct. 26—Reply brief filed by taxpayer.
Oct. 26—Copy of motion and reply brief served on General Counsel.
Dec. 9—Findings of fact and opinion rendered—Charles P. Smith, Division 5. Judgment will be entered for the respondent.
Dec. 10—Decision entered—Charles P. Smith, Division 5.

1937

Jan. 5—Petition for review by U. S. Circuit Court of Appeals, 3rd Circuit, with assignments of error filed by taxpayer—proof of service thereon.
Jan. 22—Agreed statement of evidence lodged.
Jan. 22—Agreed praecipe filed—with proof of service thereon.
Jan. 23—Agreed statement of evidence approved and ordered filed.

Petition.

(Filed June 8, 1934.)

UNITED STATES BOARD OF TAX APPEALS

NATIONAL GROCERY COMPANY, Petitioner. vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.	DOCKET No. 76600.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT: AR: B-3, dated April 25, 1934, and, as a basis of its proceeding, alleges as follows:

1. Petitioner is a corporation created by and existing under the laws of the State of New Jersey, having its principal office and place of

business at No. 300 Mercer Street, Jersey City, N. J.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner bearing a stamp postmarked dated April 25, 1934.

3. The tax in controversy is an income tax for the fiscal year ended January 31, 1931.

The amount of the alleged deficiency is $477,360.68, of which the amount of $477,322.81 is in controversy.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The entire amount of the alleged determination except the sum of $37.87, purports to be based upon the application of Section 104 of the Revenue Act of 1928, whereas said section has no lawful application to the income of petitioner, and the determination of deficiency based thereon is contrary to law.

(b) The determination of alleged deficiency to the extent of $477,322.81, purports to be based upon the application of Section 104 of the Revenue Act of 1928, notwithstanding petitioner corporation was not formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed, within the true intent and meaning of said statute.

(c) The determination of alleged deficiency to the extent of $477,322.81, purports to be based upon the application of Section 104 of the Rev-

enue Act of 1928, and presumes, without any real determination, that petitioner corporation during the period in question was formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed; notwithstanding said corporation was, in fact, organized for the purpose of conducting a mercantile and manufacturing business in 1908, and has ever since been engaged in said business, and was so engaged during the fiscal year ending January 31, 1931, and during said year operated 812 retail stores, with sales of merchandise amounting to $25,142,537.41, and owned and operated in connection with said business administrative offices, warehouses, manufacturing plants and apparatus, stables and garages, a large bakery, extensive delivery equipment, store fixtures and furniture, and a miscellaneous stock of merchandise contained in its retail stores and distributing warehouses; and the business of the petitioner corporation was not and at no time has been or is a mere holding or investment company, nor have its gains or profits been permitted to accumulate beyond the reasonable needs of its business, within the intent and meaning of Section 104 (b) of said Revenue Act.

(d) The purported determination of additional tax by the Deputy Commissioner of Internal Revenue is not based upon any lawful determination or finding that petitioner corporation was formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders, nor upon any lawful determination or finding that petitioner corporation permitted its gains or profits to accumulate beyond the reasonable needs of its business.

(e) The determination of deficiency assumes that the entire net income of petitioner corporation for the period in question, before deduction of income taxes and dividends paid, was accumulated for the purpose of preventing the imposition of the surtax upon its shareholders, notwithstanding the fact appearing upon the report dated April 24, 1932, of Revenue Agent S. H. Bischoff, referred to in the statement attached to the determination of the Commissioner, that said net income was applied during said period in part to the payment of income taxes for the preceding year amounting to $94,588.25, and to the payment of a dividend to shareholders, paid March 17, 1930, amounting to $100,000., and that said corporation was subject to an income tax for the then current year under Section 13 of said Revenue Act at the rate of 12%, amounting to $103,654.47, which has since been paid.

(f) The Commissioner of Internal Revenue did not, in fact, within the time required by law, make any determination of the essential facts necessary for the determination of additional tax under the provisions of Section 104 of the Revenue Act of 1928, the sixty day letter or notice of the Deputy Commissioner attached hereto being issued for the sole and only purpose of preventing the running of the Statute of Limitations, pending action by the Commissioner upon an offer in compromise submitted by the taxpayer under date of December 28, 1933, at the instance and request of the Commissioner.

(g) Section 104 of the Revenue Act of 1928, as construed and applied by the Commissioner of Internal Revenue, or his deputy, to the income of petitioner for the fiscal year ending January 31,

1931, violates rights secured to the petitioner under the Constitution of the United States.

5. The facts upon which the petitioner corporation relies as the basis of this proceeding are as follows:

(a) Petitioner is a business corporation organized under the laws of the State of New Jersey June 2, 1908, for the purpose of developing, owning, and operating a chain store system of grocery stores, operating from an administrative and distributing center in Jersey City, New Jersey, with retail stores covering an expanding area of adjacent territory.

The business originated with a single neighborhood store conducting a small business in 1891, with an investment of a few hundred dollars, and was incorporated in 1908.

It now includes 814 stores spread over an area covering the north central part of New Jersey and extending into the State of New York, with plans for eventual extension into adjacent territory in the City of New York and the populous adjoining territory of Westchester County, New York.

In developing this business and for the service thereof, the Company has acquired and operates a large central distributing plant in Jersey City, the buildings covering more than a city block, and including a general administration building, a large bakery, garages, stables, coffee roasting plant, and storage warehouses.

The Company has also acquired and operates a large fleet of automobiles and horse drawn trucks and other transportation equipment, and at all

times carries very large stocks of merchandise in its various stores and warehouses.

The Company was built and has developed wholly upon the principle of the accumulation of profits and investment thereof in the business.

The merchandise sales of the petitioner corporation for the fiscal year in question, ending January 31, 1931, amounted to $25,142,537.41.

The aim and purpose of the petitioner is to ultimately expand its business to a chain of not less than 2000 stores.

This business policy has long been held but the rate and territory of expansion has been necessarily checked and temporarily modified by the business uncertainties of the last few years.

The actual value of the assets of petitioner corporation has suffered enormous shrinkage during the depression, which shrinkage, however, is not reflected in the returns made for purposes of income taxation, or upon the books of the Company in the case of assets which have not been sold.

The officers, directors and stockholders of the Company determined in the exercise of their business judgment based upon their experience in the business, that the net income of the Company for the period in question should be retained in the Company and not distributed except to the extent that the same was required in the payment of taxes and the dividend paid during that year, having in contemplation the present requirements and the future business plans of the Company and the shrinkage in its net asset position resulting from the depreciation of its assets; and that the actual capital and surplus on hand at the end of said

fiscal year did not exceed the reasonable needs of the business then existing or anticipated.

(b) The Commissioner of Internal Revenue has not, in fact, made any finding or determination that petitioner corporation was formed or availed of for the purpose of preventing the imposition of surtax upon its shareholders within the intent and meaning of Section 104 of the Revenue Act of 1928.

(c) The Commissioner of Internal Revenue has not, in fact, made any finding or determination of the amount of capital which the petitioner may lawfully invest in its business, or which is necessary for the reasonable needs of the business, and without such determination has not and cannot determine the amount of gains or profits which petitioner may lawfully accumulate for the reasonable needs of its business without incurring the penalties of Section 104 of the Revenue Act of 1928.

(d) Petitioner throughout the fiscal year in question was engaged in the lawful business of a merchant and manufacturer, and lawfully entitled to develop and expand its business and to accumulate the profits thereof for such purpose, and the amount so accumulated out of the profits for the fiscal year in question was within the lawful discretion of petitioner and its officers and directors.

WHEREFORE, petitioner prays that this Board may hear the proceeding and set aside and vacate the determination of income tax liability made by the Deputy Commissioner of Internal Revenue set

forth in the notice hereto annexed, and that petitioner may have such other relief as may be proper.

(Corporate Seal) NATIONAL GROCERY COMPANY,

By HENRY KOHL, President,

(Henry Kohl), Petitioner.

Attest:

ALBERT B. VANCLIEF,

(Albert B. VanClief), Secretary.

JOHN M. ENRIGHT,

(John M. Enright)

Counsel for Petitioner,

Office and postoffice address,

75 Montgomery Street,

Jersey City, N. J.

STATE OF NEW JERSEY }
HUDSON COUNTY } ss.:

HENRY KOHL, being duly sworn, according to law, on his oath deposes and says:

That he is the President of National Grocery Company, the petitioner above named, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated upon information and belief, and those facts he believes to be true.

HENRY KOHL.

Subscribed and sworn to before me this 7th day of June, 1934.

THOMAS J. BOTTI,
Notary Public of New Jersey.

(Seal of Notary affixed)

Petition.

Exhibit A.

IT:AR:B-3 NP-2-1 act
AM-60D Apr 25 1934

National Grocery Company,
300 Mercer Street,
Jersey City, New Jersey.

Sirs:

You are advised that the determination of your income tax liability for the fiscal year(s) ended January 31, 1931, discloses a deficiency of $477,-360.68 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest at the rate of 6% per annum will accumulate.

Respectfully,

(Signed) CHAS. T. RUSSELL
Deputy Commissioner.

Enclosures:
Statement
Form 870

cab-2

STATEMENT

IT:AR:B-3
AM-60D

In re: National Grocery Company,
300 Mercer Street,
Jersey City, New Jersey.
Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
Fiscal ended January 31, 1931	$580,977.28	$103,616.60	$477,360.68

Careful consideration has been given your income tax return in connection with your protest against the action proposed in Bureau letter dated December 9, 1932.

The deficiency shown herein is based upon the report dated April 24, 1932, prepared by Revenue Agent S. H. Bischoff and transmitted to you under date of June 9, 1932, and upon such adjustments as follows:

	Income	
Net income reported on return		$863,471.67
Add:		
(a) Store fixtues salvaged		601.50
(b) Resetting expense, store fixtures		763.90
Total		$864,837.07
Less:		
(c) Additional depreciation allowable	$471.75	
(d) Adjustment of sale of stock	578.10	1,049.85

Petition.

Net income taxable under section 13 of the Revenue Act of 1928	$863,787.22
National Grocery Company.	Statement.
Brought Forward	$863,787.22
Add:	
(e) Interest on obligations of the United States and its Possessions	175.00
Dividends deducted under section 23(p) of the Revenue Act of 1928	90,683.40
Net income as adjusted, taxable under section 104(c) of the Revenue Act of 1928	$954,645.62

Explanation of Changes

(a) The salvage value of fixtures in abandoned stores is restored to income. Article 171, Regulations 74.

(b) The cost of transferring salvaged fixtures (including the above) in the amount of $763.90 is restored to income since it is considered part of the salvaged fixture account.

(c) Depreciation on salvaged fixtures is allowed as follows:

Salvaged in prior years $1,676.06 at 20%	$335.21
Salvaged in prior years $1,365.40 at 10%	136.54
Total allowed	$471.75

(d) The gain reported on the sale of Equitable Trust Company stock has been reduced by the overstated cost of $578.10.

(e) Under the provisions of section 104 of the Revenue Act of 1928, the net income is the net income as defined in section 21 of the Act increased by the sum of

the amount of dividend deduction allowed under section 23(p) of the Act and the amount of interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner.

National Grocery Company. Statement.

Computation of Tax

Net income taxable under section 13 of the Revenue Act of 1928	$863,787.22	
Income tax liability at 12%		$103,654.47
Net income taxable under section 104(c) of the Revenue Act of 1928	$964,645.62	
Income tax liability at 50%		477,322.81
Total income tax liability		$580,977.28
Income tax previously assessed		103,616.60
Deficiency		$477,360.68

After careful consideration of your protest dated July 19, 1932 and subsequent information furnished this office, the Bureau approves the revenue agent's conclusion that in accordance with the provisions of section 104 of the Revenue Act of 1928 your company has permitted its gains and profits to accumulate beyond the reasonable needs of the business instead of being distributed, which is construed as prima facie evidence of a purpose to prevent imposition of surtax upon its stockholders.

The deficiency shown above represents your income tax liability as determined under the provisions of sections 13 and 104 of the Revenue Act of 1928.

The waiver included with the compromise offer, Form 656, does not specifically cover the assessment of the pro-

posed income tax liability in issue, and since the assessment period as otherwise extended will expire on April 30, 1934, and since final action on the compromise cannot be taken prior to the expiration of the limitation period, it is necessary at this time to issue this formal notice of deficiency in accordance with the provisions of the Revenue Acts.

A copy of this communication has been forwarded to your representatives, Messrs. John M. Enright and James D. Carpenter, Jr., 75 Montgomery Street, Jersey City, New Jersey, in accordance with the authority conferred upon them in the power of attorney executed by you and on file with the Bureau.

AM/LLR-3

Answer.

UNITED STATES BOARD OF TAX APPEALS

NATIONAL GROCERY COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	DOCKET No. 76600.

The respondent, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition of this taxpayer, filed June 8, 1934, admits and denies as follows:

Answer.

1, 2, 3. Admits the averments contained in paragraphs 1, 2, and 3 of the petition.

4. Admits that the entire amount of the determination of deficiency except the amount of $37.87 is based upon the application of Section 104 of the Revenue Act of 1928; admits the payment by petitioner of $103,654.47 income tax for the fiscal year ended January 31, 1931; denies the remaining averments contained in paragraph 4.

5. For lack of sufficient knowledge to form an opinion, denies the averments contained in paragraph 5 and will require proof thereof at the hearing of this appeal.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Signed)

ROBERT H. JACKSON
Assistant General Counsel for the
Bureau of Internal Revenue.

Of Counsel:
HAROLD ALLEN
R. H. TRANSUE
Special Attorneys
Bureau of Internal Revenue.

HA-afh 6-23-34

Findings of Fact and Opinion.

UNITED STATES BOARD OF TAX APPEALS

NATIONAL GROCERY COMPANY, PETITIONER, v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 76600. Promulgated December 9, 1936.

Petitioner was incorporated in 1908 for the purpose of operating a chain of grocery stores. Very little of its profits has ever been distributed to its sole stockholder in the form of dividends. During recent years a large part of its surplus profits has been invested in bonds and stocks, which suffered a large decline in market value during the fiscal year ended January 31, 1931. During that fiscal year, and for a number of years prior thereto, the petitioner loaned to its sole stockholder large amounts of money upon which no interest has been paid to the petitioner. *Held* that for the fiscal year ended January 31, 1931, the corporation is liable to tax under section 104 of the Revenue Act of 1928.

James D. Carpenter, Jr., Esq., and *John M. Enright, Esq.*, for the petitioner.

Ralph E. Smith, Esq., and *Timothy C. Mooney, Esq.*, for the respondent.

This is a proceeding for the redetermination of a deficiency in income tax for the fiscal year ended January 31, 1931, of $477,360.68. The petitioner alleges that the respondent erred in holding it liable to tax under section 104 of the Revenue Act of 1928, and also that section 104 is unconstitutional.

Findings of Fact and Opinion.

FINDINGS OF FACT.

The petitioner was incorporated under the laws of the State of New Jersey in 1908 for the purpose of operating a chain of grocery stores. Its authorized capital stock was $5,000, divided into 50 shares of a par value of $100 each. All of the shares were beneficially owned by Henry Kohl. At the time of incorporation the business consisted of three stores. They were all operated upon a "cash and carry" basis. The business prospered and with the profits, all of which were retained in the business, additional stores were acquired. In 1911 there was an amendment to the charter and the capital stock was increased to $200,000, all of which was beneficially owned by Kohl. The capitalization of the company has never been increased from that amount and Kohl has always beneficially owned all of the shares of stock. The annual net profits of the business, as shown by petitioner's books of account for the fiscal years ended January 31, 1923, to January 31, 1931, have always been in excess of $500,000. The net profits for the last four fiscal years above referred to were as follows:

January 31, 1928	$818,043.54
January 31, 1929	870,144.92
January 31, 1930	806,507.32
January 31, 1931	786,466.98

During the same period petitioner paid a salary to Henry Kohl of $2,000 per week. The number of stores operated at the end of each of the fiscal years ending in 1928, 1929, 1930, and 1931 were 715, 782, 799, and 815, respectively.

For many years the petitioner has contemplated greatly expanding the number of stores operated. For a time it negotiated for the pur-

chase of stores in Paterson, New Jersey, and also for stores in New York City proper, and for a large chain of stores in Brooklyn, New York. The petitioner has not, however, made the contemplated expansions because in the opinion of the petitioner's president, Henry Kohl, the stores could not be purchased at what he regarded as a fair price.

For a long period of years the surplus profits of the business have been invested in stocks and bonds. At the end of the fiscal year January 31, 1931, the petitioner owned shares of stock in 58 industrial corporations, 24 public utilities, 18 insurance companies, 16 investment trusts, and 24 banks, and the bonds of many companies. The surplus was thus invested in order to obtain a greater return therefrom than would have been obtained from bank deposits and with the thought in mind of realizing cash thereon for the purpose of expanding its chain of grocery stores at any time desired.

The only dividends the petition has ever paid to its sole stockholder up to January 31, 1931, were a dividend of $25,000 in 1917, and a dividend of a like amount in 1918. Petitioner had, however, advanced money to its sole stockholder to an amount of $394,100 to January 26, 1925. These advances were made on notes bearing interest at 6 percent per annum, although no interest has ever been charged or paid thereon. After January 26, 1925, the petitioner also loaned to its sole stockholder additional amounts on demand notes bearing no interest, and the aggregate amount of the loans to the petitioner up to January 31, 1931, totaled $610,000. During the fiscal year ended January 31, 1931, the petitioner loaned to its sole stockholder, without interest,

$140,000, $40,000 of which amount was to enable Kohl to acquire a house in Florida and $100,000 to enable him to make a personal charitable contribution of that amount to a Y. W. C. A. A considerable portion of the loans made to the petitioner were canceled by dividends declared by the petitioner after January 31, 1931, although the outstanding loans to the petitioner on April 23, 1936, still stood at $424,000. The balance sheets of the petitioner for the fiscal years ended January 31, 1928, to January 31, 1931, inclusive, show as follows:

ASSETS

	Fiscal years ended			
	1/31/28	1/31/29	1/31/30	1/31/31
Cash	$ 659,734.40	$ 890,397.59	$1,332,332.28	$1,405,961.04
Notes receivable	424,100.00	460,000.00	470,000.00	610,000.00
Accounts receivable	1,888.82	3,975.19	26,816.37	3,220.85
Inventories	2,615,057.67	2,917,716.55	3,189,396.72	2,812,939.16
Mortgage	59,000.00	59,000.00	59,000.00	59,000.00
Bonds	256,114.76	96,820.30	59,435.00	313,391.27
Stocks	2,169,687.62	2,318,074.13	2,720,283.07	2,676,061.47
Other	6,236.39	7,425.08	10,150.89	20,686.18
Deferred	33,338.64	25,685.23	31,875.79	29,687.74
Permanent	1,542,129.60	1,501,193.83	1,345,976.63	1,177,489.43
Total	$7,767,287.90	$8,280,287.90	$9,245,266.75	$9,108,437.14

LIABILITIES

Notes payable and mortgages	$1,008,750.00	$ 700,000.00	$ 790,000.00	$ .....
Accounts payable	258,889.61	270,318.54	371,121.96	269,140.49
Accrued	7,742.15	7,385.56	19,757.11	7,411.70
Reserve income tax	93,933.45	72,035.56	52,592.97	51,330.42
Reserve insurance	417,797.77	491,032.34	565,970.45	641,588.99
Capital stock and surplus	5,980,174.92	6,739,515.90	7,445,824.26	8,138,965.54
Total	$7,767,287.90	$8,280,287.90	$9,245,266.75	$9,108,437.14

Findings of Fact and Opinion.

The fair market value of the securities owned on January 31, 1931, was $2,125,434.50 as against their cost of $2,989,452.74.

The petitioner was availed of during the fiscal year ended January 31, 1931 for the purpose of preventing the imposition of the surtax upon its sole stockholder "through the medium of permitting its gains and profits to accumulate instead of being divided or distributed."

OPINION.

SMITH: The first question presented by this proceding is whether the petitioner is liable to tax under section 104 of the Revenue Act of 1928 upon its profits for the fiscal year ended January 31, 1931. That section, so far as material to this proceeding, is as follows:

(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax.

Findings of Fact and Opinion.

In his deficiency notice the respondent stated:

After careful consideration of your protest dated July 19, 1932 and subsequent information furnished this office, the Bureau approves the revenue agent's conclusion that in accordance with the provisions of section 104 of the Revenue Act of 1928 your company has permitted its gains and profits to accumulate beyond the reasonable needs of the business instead of being distributed, which is construed as prima facie evidence of a purpose to prevent imposition of surtax upon its stockholders.

Does the evidence overcome this prima facie presumption? And, if so, was the petitioner "availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed", during the taxable year?

The petitioner was organized for the purpose of operating a chain of grocery stores. For a number of years after its organization the profits of the business were used in extending the chain. At some time prior to 1922 the petitioner began to invest a portion of its surplus profits in the purchase of bonds and stocks. Its balance sheet at January 31, 1922, shows its investment in bonds and stocks at $490,000 and $130,710, respectively. Its holdings of securities in subsequent years greatly increased. There was also, up to 1929, a very large increase in the market value of the securities acquired. Since 1929 the petitioner has not greatly expanded its grocery business. Its profits have been large but they have not been paid over to its sole stockholder in the form of dividends. Most of them have been invested in securities.

Petitioner's balance sheet at the beginning of the taxable year shows cash on hand of $1,332,-332.28; notes receivable (Henry Kohl), $470,000; accounts receivable, $26,816.37; bonds, mortgages, and stocks, $2,838,718.07; and other current assets against actual liabilities (exclusive of reserves) of $1,180,879.07. At the end of the taxable year petitioner's balance sheet shows cash, $1,405,961.04; notes receivable (Henry Kohl), $610,000; bonds, mortgages, and stocks, $3,048,-452.74; and other current assets against the actual liabilities (exclusive of reserves) of only $276,-552.19. Its actual surplus at January 31, 1931, was $7,938,965.54.

The petitioner contends that this large surplus was of benefit to it in obtaining credit at banks and in enabling it to purchase merchandise at a low price. It appears, however, that the petitioner's credit had been excellent for many years prior to the taxable year and that it did not obtain loans from banks at a lower rate of interest simply because it had a large investment in bonds and stocks. Manifestly, the amounts invested in bonds and stocks were not used by the petitioner either in the taxable year or for several years prior or subsequent thereto in its grocery business. We find as a fact that the petitioner's accumulation of earnings was far in excess of the "reasonable needs" of the corporate business.

We are also of the opinion that the evidence of record does not rebut the prima facie presumption created by the statute that the accumulation of earnings beyond the "reasonable needs of the business" was for the purpose of preventing the imposition of the surtax upon its sole stockholder. The evidence shows that Henry Kohl, personally, needed some of the profits of the business. Prior to the taxable year he had borrowed from the

petitioner $470,000, and, during the taxable year, he borrowed an additional amount of $140,000. No interest was ever charged or paid upon these loans. If the amount borrowed during the taxable year had been distributed as a dividend the petitioner would have been subject to a large surtax upon it. By reason of the failure to pay the $140,000 as a dividend the petitioner escaped surtax upon that amount of income. See *William C. DeMille Productions, Inc.*, 30 B. T. A. 826.

Upon the evidence before us we have made the finding that the petitioner was "availed of" during the fiscal year ended January 31, 1931, for the purpose of preventing the imposition of the surtax upon its sole stockholder "through the medium of permitting its gains and profits to accumulate instead of being divided or distributed." Cf. *United Business Corporation of America*, 33 B. T. A. 83; *R. & L., Inc.*, 33 B. T. A. 857.

The petitioner contends that: "Section 104 of the Revenue Act of 1928, as construed and applied by the Commissioner of Internal Revenue, or his deputy, to the income of petitioner for the fiscal year ending January 31, 1931, violates rights secured to the petitioner under the Constitution of the United States." It has not, however, advanced any argument in support of this proposition in its brief, and the constitutionality of the provision is sustained upon the authority of *United Business Corporation of America* v. *Commissioner* (C. C. A., 2d Cir.), 62 Fed. (2d) 754; certiorari denied, 290 U. S. 635; *United States* v. *Tway Coal Sales Co.* (C. C. A., 6th Cir.), 75 Fed. (2d) 336; *Williams Investment Co.* v. *United States*, 3 Fed. Supp. 225; 77 Ct. Cls. 396.

Reviewed by the Board.

Judgment will be entered for the respondent.

MELLOTT, dissenting: The majority holding, that the act is not unconstitutional, is, in my judgment, correct. I have considerable doubt, however, that the tax and penalty prescribed by it should be assessed and imposed under the facts before us.

The petitioner corporation was not formed for the purpose of preventing the imposition of the surtax upon its shareholders. It was formed many years prior to the enactment of the income tax law and for the purpose, as set out in the prevailing opinion, "of operating a chain of grocery stores."

Was it "availed of" during the taxable year for the inhibited purpose? The respondent contends that it was. In his notice of deficiency it is stated that he "approves the revenue agent's conclusion that * * * [it] * * * permitted its gains and profits to accumulate beyond the reasonable needs of the business." Such determination apparently was made under section 104 (b) of the Revenue Act of 1928, which prescribes that such a finding is prima facie evidence of a purpose to evade the surtax.

It may, or may not, be significant that the respondent did not categorically find that petitioner was "availed of" for the interdicted purpose; but such finding must be made by this Board if it is to approve the deficiency. Before we make such finding, however, there should be at least a fair preponderance of the evidence to support it, and I am not satisfied that such requirement has been met.

The prevailing opinion makes reference to three or four facts relied upon as being particularly significant—that the profits, though large, were

not paid over to the sole stockholder in the form of dividends but were invested partially in securities; that the surplus increased during the taxable year; and that the sole stockholder borrowed from the petitioner certain sums of money without interest. These are circumstances which should be considered, but I do not think, upon this record, that they are so indicative of the nefarious purpose as to compel the conclusion reached by the majority.

The respondent offered no evidence, except a statement of the cost and market value of the securities, prepared from the books of the company, and the income tax returns of the petitioner and its sole stockholder. The petitioner produced several witnesses. At the risk of unduly extending this discussion, I feel impelled to make reference to some of the facts established by the evidence.

The treasurer of the company, who had been associated with the sole stockholder for more than 30 years, stated that, in her opinion, the surplus was not in excess of the reasonable needs of the business. She testified that to carry on the business, to buy the large quantities of merchandise required, and to pay the other expenses of the business, required a large surplus and that even with the large surplus on hand, there were times when the company was short of cash and had to borrow temporarily from the banks in order to pay the invoices of incoming merchandise.

Kohl, the sole stockholder, when asked why he kept all of the earnings of the company in the business instead of drawing them out, stated, "I needed them in the business—always needed them in the business. I never had any too much money." He also stated that he always tried to hold the corporation ready at all times to buy, if necessary,

a whole year's supply of merchandise, if he thought that it could make money by doing so. When asked if, in his judgment, it was necessary for it to be continuously in the position of purchasing supplies in such quantity, he answered: "Well, the more money you have got, the cheaper you can buy and the more independent you are and the more you are recognized—and everything depends upon your statement, see?" It had been the policy of the business since its establishment "to keep in the statement and in the business every possible dollar and let them accumulate for the benefit of the business." From the very beginning the sole stockholder had followed the policy of living simply, drawing only enough salary to live on and confining his expenditures outside of the business to his living expenses. In its first year the company operated three stores; in 1912, 57; in 1915, 171; in 1918, 268; in 1923, 388; and, as shown in the findings above, in 1928, 715, and in 1931, 815. This growth corresponded in a general way with the ambition of the sole stockholder, one witness telling us that when he had 3 stores his ambition was to have 10; when he had 10, his ambition was to have 50; when he had 50, then to have 100, then 500, then 1,000, etc. With this idea in mind the warehouses, garages, bakery, and other facilities of the petitioner were expanded accordingly and such facilities now have sufficient capacity to take care of twice the number of stores which it owned during the taxable year.

Kohl further testified that before 1930 he had considered the purchase of a chain of stores in Paterson, New Jersey. During that year he also carried on negotiations with the owner of some 500 or 600 stores for their purchase. This was a business of from $5,000,000 to $6,000,000. While the stores were not actually purchased during

the taxable year, the fact that such purchase was contemplated is a significant circumstance which should be considered by this Board in passing upon the question at issue.

Petitioner sold approximately $20,000,000 worth of merchandise during the taxable year, and, by taking advantage of its discounts, earned almost a half million dollars. Its pay roll and rents alone amounted to $4,000,000 a year. During the taxable year it paid Federal income taxes of $103,616.60. If it and its officers had wished to avoid paying Federal taxes, a method far more efficacious than accumulating "an unreasonable surplus" could have been adopted. For instance, it could have sold some of its securities, which had depreciated in value more than a million dollars, deducted its loss, and thus not only could have saved on its income tax for that year, but in addition could have adjusted its surplus and earnings so that its books would show an actual loss for the taxable year instead of a gain or profit.

The petitioner paid its sole stockholder more than $100,000 a year as a salary. This was reported by him in his income tax return and tax was paid accordingly. It was ample for his ordinary living expenses and there was apparently no good reason why he should pay out any more of the earnings of the corporation to himself. He paid a surtax of more than $8,000 on his salary and a total tax of more than $11,000 for each of the four years 1928 to 1931, inclusive.

William J. Field, president of a large bank, testified that in his opinion the capital and surplus of petitioner was not in excess of the reasonable needs of the business, pointing out that at that time "we were starting on a panic and panic conditions. No one could foretell the future at

that time. The National Gocery Co. had a turnover of over six to eight times its capital in the volume of business it did in those years * * *. They had experienced in previous years rather large losses on inventory and felt they should keep a considerable working capital and surplus to meet any additional losses they might encounter." He also pointed out that the accumulation in surplus invested in securities enabled it to show a better credit statement and to borrow whenever it wished at low rates of interest. Frank C. Ferguson, another bank president, testified to substantially the same effect.

Another circumstance worthy of more than passing consideration is the fact that petitioner's real estate holdings, as well as its stocks and bonds, had materially depreciated in value. This depreciation, though it had not been reflected in the balance sheet, was nevertheless a very real thing. The stocks and bonds had depreciated more than $900,000. The merchandise inventory due to the general decline, had decreased approximately a quarter of a million dollars, while the fair market value of the real estate had a shrinkage in value, over and above the depreciation charged off, amounting to approximately $125,000.

Being concerned, as we are, with actualities—a rule which certainly should be applied when we are passing upon the applicability of a penal statute such as we have before us, and regardless of the fact that the books of the company reflected an addition to surplus, the above evidence clearly shows that during the taxable period before us there was no unreasonable accumulation of gains and profits.

Congress was very careful to limit this highly penal statute to corporations which were formed

or availed of for the purpose of avoiding the imposition of surtax upon the shareholders. In the first case which came before this Board under the section as originally enacted (*United Business Corporation of America,* 19 B. T. A. 809; affd., 62 Fed. (2d) 754; certiorari denied, 290 U. S. 635), both this Board and the Circuit Court upon appeal properly stressed the importance of establishing by the evidence the unlawful purpose. It was there pointed out that if such unlawful purpose was shown to exist, then it was immaterial whether the accumulation be large or small. The ultimate question before us, then, is, was there a purpose to enable the shareholder to escape surtaxes. The test, said the Second Circuit Court of Appeals in *United Business Corporation, supra,* is "the state of mind itself, and the presumption does no more than make the taxpayer show his hand." This Board, in the recent case of *A. D. Saenger, Inc.,* 33 B. T. A. 135; affd., 84 Fed. (2d) 721; certiorari denied, October 12, 1936, added that "the display of that 'hand' does not relieve the taxpayer if it discloses the state of mind the statute condemns."

The inquiry as to whether there has been an accumulation of surplus beyond the reasonable needs of the business is not determinative of the ultimate question to be decided. Even if the evidence be sufficient to show that there was an unreasonable accumulation—which, however, I do not believe has been shown in this case—this merely raises a rebuttable presumption of the existence of the crucial purpose. Such presumption is overcome by the evidence in this case which shows an absence of such purpose. The corporation merely continued its long established practice of "ploughing its earnings back into the business." Indubitably it had in the earlier years no "purpose of

preventing the imposition of the surtax upon its shareholders", for there was no surtax to escape. There had been no "sudden change of policy, coincident with large increases in the surtax rates, (which) might * * * betray a purpose to accumulate against a season more propitious for distribution." (*United Business Corporation, supra.*) It had pursued the same policy throughout the years.

In *Cecil B. DeMille,* 31 B. T. A. 1161, 1174 (on appeal to the 9th Circuit), the facts made a much stronger case for the respondent than the facts before us here; but it was pointed out that the taxes and penalties prescribed by the section "are not imposed because of effects; avoidance *per se* is not prohibited. It is the *purpose,* the intention motivating a course of conduct which is made controlling by the very words of the statute. Unless the *purpose* was to prevent the imposition of surtaxes, the tax may not be imposed." This language was recently quoted and reaffirmed by the Board in *Sauk Investment Co.,* 34 B. T. A. 732, 738, and in the very last case which we decided under this section, *Almours Securities, Inc.,* 35 B. T. A. No. 11, the Board said, "There must be such an intent on the part of those who were responsible for the organization of the corporation, or for the conduct of its operations." In the *DeMille* case it was pointed out that the proof went well beyond mere denial of prohibited intent and showed affirmatively a plan necessitating the accumulation of earnings and "the end to which they might ultimately be used." The same, or stronger, language might be used here.

No case has come before the courts or this Board where a corporation engaged in a mercantile or industrial activity, organized prior to the enactment of the income tax law and which has con-

sistently followed the policy of "ploughing its earnings back into the business", has ever been required to pay the tax and penalty imposed by the section in question. In practically every case in which such penalty has been imposed, a large portion of the corporation's assets had been conveyed to it at the time of its formation, or at a later time, by the principal stockholder or stockholders, or the corporation was "a mere holding company." Typical cases are the following: *United Business Corporation of America, supra; United Business Corporation of America,* 33 B. T. A. 83 (reversed on stipulation of the parties); *Keck Investment Co.,* 29 B. T. A. 143; affd., 77 Fed. (2d) 244; certiorari denied, 296 U. S. 633; *William C. DeMille Productions, Inc.,* 30 B. T. A. 826; *Cecil B. DeMille, supra; Fisher & Fisher, Inc.,* 32 B. T. A. 211; affd., 84 Fed. (2d) 996; *Irvington Investment Co.,* 32 B. T. A. 1165; *A. D. Saenger, Inc., supra; R. & L., Inc.,* 33 B. T. A. 857; affd., 84 Fed. (2d) 721; certiorari applied for September 21, 1936; *Edward G. Swartz, Inc.,* 33 B. T. A. 355; *Rands, Inc.,* 34 B. T. A. 1094; *Almours Securities, Inc., supra.* There is a substantial difference between the two classes of corporations, although I would not go so far as to say that the former could never be subjected to the penalty.

This being a "fact case", it is with some reluctance that I reach a conclusion at variance with that of the Member who heard the testimony of the witnesses and had the advantage of observing their manner and demeanor while testifying; but I feel that the evidence is not sufficient to justify the imposition of the penalty and accordingly I dissent.

STERNHAGEN, ARUNDELL, MURDOCK, LEECH, ARNOLD, and DISNEY agree with this dissent.

[SEAL]

Decision.

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

NATIONAL GROCERY COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	DOCKET No. 76900.

Pursuant to the determination of the Board, as set forth in its report promulgated December 9, 1936, it is

ORDERED and DECIDED: That there is a deficiency of $477,360.68 for the fiscal year ended January 31, 1931.

Enter:

(Signed) CHARLES P. SMITH
Member.

Entered Dec. 10, 1936.

Filed Jan. 5, 1937
U. S. Board of Tax Appeals

Petition for Review and Assignment of Errors.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

NATIONAL GROCERY COMPANY, body corporate, Petitioner on Appeal, vs. THE COMMISSIONER OF INTERNAL REVENUE, Respondent.	B. T. A. No. 76600.

To the Honorable Judges of the United States Circuit Court of Appeals, for the Third Circuit:

Now comes NATIONAL GROCERY COMPANY, a corporation organized and existing under the laws of the State of New Jersey, and respectfully shows and charges as follows:

I

JURISDICTION

That the petitioner on review is National Grocery Company, a New Jersey corporation.

That the respondent on review is the Commissioner of Internal Revenue.

The petitioner filed a United States income tax return for its fiscal year ending January 31, 1931, and paid income taxes shown to be due thereon aggregating $103,616.60.

This is a proceeding for review by the United States Circuit Court of Appeals for the Third Circuit of the order and determination of the United States Board of Tax Appeals of December 9, 1936, which held that your petitioner was liable for a deficiency income tax for the year aforesaid of $477,360.68, under Section 104 of the Revenue Act of 1928.

Petitioner's tax return was filed in the office of the Collector of Internal Revenue at Newark, New Jersey, and its taxes were paid to such Collector.

Jurisdiction is given to this Honorable Court in this case by United States Code, Title 26, Section 641.

II

Nature of the Controversy

Petitioner, National Grocery Company, was organized in the year 1908 for the purpose of conducting a mercantile and manufacturing business, and has ever since been engaged in said business, and was so engaged during the fiscal year ending January 31, 1931. Petitioner's business was organized by Henry Kohl, its sole stockholder, under whose personal management and direction it has been continuously operated. When the Company was organized it owned and operated three stores, had total assets of less than $39,000, and its capital and surplus aggregated $20,943.46.

From the formation of the Company the policy was followed of keeping all the earnings in the business and expanding the business out of earnings. By adhering to this policy and by careful management, the Company's business was increased steadily and consistently, so that for the year under review the Company owned and oper-

ated 815 stores; its gross sales were in excess of $25,000,000; the merchandise sold cost $20,000,000; it had 2332 employees, who were paid wages of $3,132,891.99; it paid rents of $929,918.70, and it owned and operated in connection with its merchandising business, administrative offices, warehouses, manufacturing plants and apparatus, stables and garages, a large bakery, extensive delivery equipment, store fixtures and furniture, and a miscellaneous stock of merchandise contained in its retail stores and distributing warehouses.

In its income tax return for the year under review the Company reported net taxable income of $863,471.67, on which it paid income taxes of $103,616.60.

This same year, however, the Company's assets, consisting of inventory of merchandise, real estate, and securities in its investment account, depreciated in value in excess of $2,000,000, none of which was written off on the books, or was shown on the income tax return.

The total capital and surplus at the end of the year under review, not deducting any of this depreciation, was $8,909,274.72. That year the Company paid its sole stockholder a salary of $104,000, but declared no dividends.

The National Grocery Company had never financed any of its expansions through the sale of stocks or bonds, and its sole stockholder never contributed any assets of any kind to the corporation, since its organization in 1908, except that in 1911 the Company was merged with the Henry Kohl Company and through that merger acquired three additional stores. From that date the business grew solely from the policy of plowing the earnings back into the business.

Petition for Review and Assignment of Errors.

The Commissioner of Internal Revenue on April 25, 1934, mailed notice to your petitioner of an alleged deficiency in income taxes for the fiscal year ended January 31, 1931. The amount of the alleged deficiency was $477,360.68.

The notice of deficiency had annexed to it a statement, which contained the following:

"COMPUTATION OF TAX.

Net income taxable under section 13 of the Revenue Act of 1928	$863,787.22	
Income tax liability at 12%		$103,654.47
Net income taxable under section 104 (c) of the Revenue Act of 1928	$954,654.62	
Income tax liability at 50%		477,322.81
Total income tax liability		$580,977.28
Income tax previously assessed		103,616.60
Deficiency		$477,360.68

After careful consideration of your protest dated July 19, 1932, and subsequent information furnished this office, the Bureau approves the revenue agent's conclusion that in accordance with the provisions of section 104 of the Revenue Act of 1928 your company has permitted its gains and profits to accumulate beyond the reasonable needs of the business instead of being distributed, which is construed as *prima facie* evidence of a purpose to prevent imposition of surtax upon its stockholders.

The deficiency shown above represents your income tax liability as determined under the

provisions of sections 13 and 104 of the Revenue Act of 1928."

Your petitioner promptly and within the time allowed by law filed with the United States Board of Tax Appeals a petition for the redetermination of the alleged deficiency.

On the trial before the Board of Tax Appeals the petitioner proved by the testimony of two of its officers, and two bankers who were familiar with the business, that the petitioner in the year in question did not have more capital than the reasonable needs of the business required, and that it was a sound policy that year, in the light of the panicky conditions then existing, for the Company not to pay out its moneys in dividends, but to conserve all its resources. The facts concerning the origin, development, growth, and conduct of the business were fully proved by competent evidence, as shown by the record.

The respondent offered no testimony contradicting that of the petitioner, but it did offer in evidence the income tax returns of the petitioner, and of Henry Kohl, its sole stockholder.

In due time after the submission of briefs by counsel for the respective parties, the Board of Tax Appeals on December 9, 1936, filed its opinion and determination holding that petitioner was availed of during the fiscal year ended January 31, 1931, for the purpose of preventing the imposition of the surtax upon its sole stockholder "through the medium of permitting its gains and profits to accumulate instead of being divided or distributed."

Seven members of the Board of Tax Appeals dissented from the opinion of the majority, holding that the evidence was not sufficient to justify the imposition of the penalty upon your petitioner,

pointing out that this is the first case which has come before the courts or the Board where a corporation engaged in a mercantile or industrial activity, organized prior to the enactment of the income tax law and which has consistently followed the policy of "ploughing its earnings back into the business", has ever been required to pay the tax and penalty imposed by the section in question.

This appeal is taken from the whole and every part of the judgment and determination of the United States Board of Tax Appeals aforesaid dated December 9, 1936.

III.

Assignment of Errors.

Petitioner alleges that Section 104 of the Revenue Act of 1928 is unconstitutional, and is not applicable to petitioner, and that the United States Board of Tax Appeals erred in the following respects:

(1) Section 104 of the Revenue Act of 1928 has no lawful application to the income of petitioner, and the determination of deficiency based thereon is contrary to law.

(2) The United States Board of Tax Appeals erred in holding that petitioner was availed of for the purpose of preventing the imposition of the surtax upon its sole stockholder through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, within the true intent and meaning of said statute.

(3) The United States Board of Tax Appeals erred in upholding and affirming the determina-

tion of the Commissioner of Internal Revenue which, while purporting to be based upon the application of Section 194 of the Revenue Act of 1928, presumed, without any real determination, that petitioner during the period in question was formed or availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, notwithstanding said corporation was, in fact, organized for the purpose of conducting a mercantile and manufacturing business in 1908, and has ever since been and was so engaged during the fiscal year ending January 31, 1931, and during said year operated 815 retail grocery stores, with sales of merchandise amounting to $25,142,537.41, and owned and operated in connection with said business administrative offices, warehouses, manufacturing plants and apparatus, stables and garages, a large bakery, extensive delivery equipment, store fixtures and furniture, and a miscellaneous stock of merchandise contained in its retail stores and distributing warehouses; and the business of the petitioner was not and at no time has been or is a mere holding or investment company, nor have its gains and profits been permitted to accumulate beyond the reasonable needs of its business, within the intent and meaning of said Section.

(4) The United States Board of Tax Appeals erred in holding that the National Grocery Company had "gains and profits" for its fiscal year ending January 31, 1931, when the undisputed testimony showed that the market value of its assets during that year depreciated in value far in excess of the net earnings reported in the income tax return.

(5) The United States Board of Tax Appeals erred in holding that the petitioner's accumulation of earnings was in excess of the reasonable needs of the corporation's business, there being no evidence before the Board to justify such a finding, and, the evidence to the contrary introduced by the petitioner being wholly uncontradicted; neither the Commissioner nor the United States Board of Tax Appeals having made any determination as to the amount of capital and surplus that was reasonably required for the operation, under the existing conditions, of petitioner's business.

(6) The United States Board of Tax Appeals erred in deciding that there was a deficiency of $477,360.68 against the petitioner, since the purported determination by the Commissioner of additional tax against the petitioner was not based upon any lawful determination or finding that petitioner corporation was formed or availed of for the purpose of preventing the imposition of the surtax upon its stockholders, nor upon any lawful determination or finding that petitioner corporation permitted its gains and profits to accumulate beyond the reasonable needs of its business.

(7) The United States Board of Tax Appeals erred in upholding and affirming the action of the Commissioner of Internal Revenue in that the determination of deficiency assumes that the entire net income of petitioner corporation for the period in question, before deduction of income taxes and dividends paid, was accumulated for the purpose of preventing the imposition of the surtax upon its stockholders, notwithstanding the fact that said net income was applied during the said period in part to the payment of income taxes

for the preceding year amounting to $94,588.25, and to the payment of a dividend to shareholders, paid March 17, 1931, amounting to $100,000, and that said corporation was subject to an income tax for the then current year under Section 13 of said Revenue Act at the rate of 12%, amounting to $103,616.60, which was paid.

(8) The Commissioner of Internal Revenue did not, in fact, within the time required by law, make any determination of the essential facts necessary for the determination of additional tax under the provisions of Section 104 of the Revenue Act of 1928, the sixty-day letter or notice of the Deputy Commissioner being issued for the sole and only purpose of preventing the running of the Statute of Limitations, pending action by the Commissioner upon an offer in compromise submitted by the taxpayer under date of December 28, 1933, at the instance and request of the Commissioner.

(9) Section 104 of the Revenue Act of 1928 as construed and applied by the Commissioner of Internal Revenue and by the United States Board of Tax Appeals, is null and void in that it is not a tax on income, within the meaning of the Sixteenth Amendment, but is a direct tax within the meaning of Article I, Section 9, Clause 4 of the Constitution, and invalid as such, not being laid in proportion to the Census.

(10) Section 104 of the Revenue Act of 1928 as construed and applied by the Commissioner of Internal Revenue and by the United States Board of Tax Appeals in its judgment appealed from, conflicts with the Fifth Amendment and is null and void, because the so-called tax is nothing less than the confiscation, by action of the Commissioner of Internal Revenue, of so much of peti-

tioner's property as equals the amount of the tax, there being no standard specified in the statute as to the amount of earnings that a corporation engaged in active business may retain for necessary business needs and reasonable expansion, nor does the statute make any specification as to the amount of distribution of earnings that must be made by a corporation to its stockholders to avoid the imposition of the tax, nor is any method or means or standard stated in the law whereby a taxpayer may determine how his business must be conducted in order to avoid a capricious levying of the tax by the Commissioner of Internal Revenue.

(11) Section 104 of the Revenue Act of 1928 is null and void in that it attempts to repose in the Commissioner of Internal Revenue power to determine in his sole discretion, by standards that he alone sets up, whether or not a corporation is availed of for the purpose of avoiding the imposition of the surtax, in contravention of Article I, Section I, and Article I, Section 8, Clause 1, of the Constitution of the United States.

(12) Section 104 of the Revenue Act of 1928 is null and void in that under the guise of an income-tax law, it permits the taking of petitioner's property, without due process of law within the meaning of the Fifth Amendment to the Constitution of the United States.

(13) Section 104 of the Revenue Act of 1928 is null and void in that it reposes in the Commissioner of Internal Revenue sole power and authority to select from the corporations in the United States that make net income those that, in his sole discretion, and by standards that he alone determines, he will subject to the penalty tax, and those

that he will not, by reason whereof said law is arbitrary, oppressive, inequitable, uncertain, ununiform, confiscatory, and not applicable alike to all corporations throughout the United States, in violation of the Fifth Amendment to the Constitution of the United States.

(14) Section 104 of the Revenue Act of 1928 is in conflict with the Tenth Amendment to the Constitution of the United States, and is null and void in that, under the guise of an income tax law, it confiscates the property of corporations incorporated under the laws of the several States and unduly restricts their natural growth and expansion, whereby there will result a lessening demand for labor, a reduction in the amount of wages paid, a reduction in the amount that otherwise would be paid for the purchase of goods by a growing business, a lessening of local taxes paid, all to the increasing detriment of the public welfare of the several States.

(15) The United States Board of Tax Appeals erred in affirming the action of the Commissioner of Internal Revenue and in making its determination in that said action of the Commissioner and of the Board of Tax Appeals amounted to the imposition of an excessive fine, within the meaning of the Eighth Amendment to the Constitution of the United States.

(16) Section 104 of the Revenue Act of 1928 is unconstitutional and null and void in that it is not levied uniformly on all corporations in the United States, and hence violates Article I, Section VIII, Clause 1 of the Constitution.

(17) Section 104 of the Revenue Act of 1928 is unconstitutional and null and void in that it at-

tempts to vest judicial power in the Executive Branch of the Government, contrary to the letter and spirit of Article III, Section I, Clause 1 of the Constitution.

WHEREFORE your petitioner prays that the judgment and determination of the United States Board of Tax Appeals may be reviewed by the United States Circuit Court of Appeals for the Third Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing, and that the determination of the Commissioner of Internal Revenue and United States Board of Tax Appeals aforesaid may be reversed and set aside for the reasons aforementioned.

JAMES D. CARPENTER, JR.
Attorney for and of Counsel
with Petitioner.

Dated: January 4, 1937.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

ANNA L. MULLINS, of full age, being duly sworn, according to law, upon her oath deposes and says: I am Treasurer of National Grocery Company, the petitioner in the foregoing petition for review. I have read the same, know the contents thereof, and the matters and things therein contained are true as I verily believe.

This petition is filed in good faith and not for the purpose of delay.

ANNA L. MULLINS

Subscribed and sworn to before me this fourth day of January, 1937.

THOMAS J. BOTTI,
Notary Public of New Jersey.

Service of a copy of the foregoing is hereby acknowledged this 5th day of January, 1937.

MORRISON SHAFROTH,
Chief Counsel
for the
Bureau of Internal Revenue,
Attorney for Respondent.

Statement of Evidence and Exhibits 1-24 Inclusive and "A".

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

NATIONAL GROCERY COMPANY, Petitioner, *vs.* GUY T. HELVERING, Commissioner of Internal Revenue, Respondent.	B. T. A. DOCKET No. 76600.

Hearing at New York, New York, on the 7th day of May, 1936, at 10:30 o'clock A. M.

The above entitled cause came on for hearing on this the 7th day of May, 1936, before Honorable Charles P. Smith, Member of the United States Board of Tax Appeals, at New York, New York, pursuant to notice of hearing heretofore given; whereupon the following proceedings were had and testimony heard, to wit:

Appearances:

James D. Carpenter, Jr., Esq. (75 Montgomery Street, Jersey City, N. J.), on behalf of the Petitioner.

Ralph E. Smith, Esq. (Herman Oliphant, General Counsel for the Department of the Treasury), on behalf of the Commissioner of Internal Revenue, Respondent.

Statement of Evidence and Exhibits 1-24 Inclusive and "A".

PROCEEDINGS.

The Clerk: Docket 76600 National Grocery Company.

STATEMENT OF CASE FOR PETITIONER.

Mr. Carpenter: This is a deficiency assessment for $477,360 levied against the petitioner for the fiscal year ending January 31, 1931, under Section 104 of the Revenue Act of 1928, for permitting its gains and profits to accumulate in excess of the reasonable needs of the business, as the government alleges. I don't think you need more than that as a preliminary statement. I should say I have been cooperating with counsel for the government for some weeks in getting the facts in shape for easy presentation. I have prepared a number of schedules of facts from the books and submitted them all to counsel for the government, and while we have not prepared a formal stipulation we have agreed that I shall make certain offers and they will not be objected to. There are some things that they reserve the right to object to as to materiality, and not as to form. I think we can clear the decks rapidly on those formal matters and get down to the taking of testimony.

The Member: Mr. Smith, have you on opening statement to make?

Mr. Smith: Yes, if your Honor please, as counsel has said, this is a case in which a tax is proposed due to the alleged unreasonable accumulation of surplus without making distribution. As I intimated to counsel a moment ago, it is not the intention of the respondent to take much time offering testimony. Our case will be found chiefly

in the schedules of the operations of the National Grocery Company during the year in question and previous years. From that we will ask the Board to make its deductions.

But, at the outset, the Board will get our position more clearly if I state that these figures we expect will show that this business has been eminently successful, and that from January 1, 1913, when the surplus of the company was $70,000, it increased until at the close of January 31, 1931, the year in question, it had a surplus of $8,909,000; and that during that period only $50,000 was declared in dividends. We expect also to show that during the same period or, rather, beginning on January 31, 1931, there were loans from the corporation to Mr. Kohl, who owned practically all of the stock, beginning with $26,000 in 1921 and closing with $610,000 at the close of 1931, and that during that period those loans were made from his corporation to him, part of the time on notes without interest and part of the time on notes specifying interest, but on which he paid no interest to the corporation. That is the high light in this case—those two things. There will be other things that will develop from the stipulations. But that your Honor may see the reasons as the Commissioner sees it for holding that there are unreasonable withholdings from dividend distributions, we mention those things now.

Mr. Carpenter: I did not attempt to give you a recitation of the facts. I think we would perhaps prefer to give you the high lights as we go along and make the offers. You will get our story from that.

The first thing that I offer is a determination by the Commissioner of Internal Revenue that

for the calendar years ending January 31, 1923, and January 31, 1924, this statute, Section 220 of the old act applies and there was unreasonable gain. The proceedings which resulted in a decision by the General Counsel's office, that after a review of the facts there was no such unreasonable gain, were followed by a stipulation on which the Board made its determination of a small deficiency of $9,300 and $10,000, respectively, not under this particular section or under Section 220. I think that goes to show that up to the years in question, that is, 1923 and 1924, the government or this Board determined as late as a judgment of June 12, 1929, that there was no unlawful gain or excessive gain in the surplus.

The Member: But the Board did not make any adjudication of the case?

Mr. Carpenter: No, made by the General Counsel's office, and a stipulation was entered on that opinion. And then the effect of the Board's decision was that there are deficiencies for the fiscal year ending January 31, 1923 and 1924 in the amount of $9,300 and $10,000, respectively. But as to those particular years there was no tax under Section 220.

The Member: The only thing was there was no adjudication of the interest by the Board.

Mr. Carpenter: Except the stipulation of general counsel.

Counsel does not object to the form of the offer, but only as to the materiality.

Mr. Smith: We object to the relevancy and the materiality of this correspondence and these determinations. They involve former years. They are not an adjudication by any tribunal. I think that sufficiently states the position. It has no more bearing or effect on the year in question than a

revenue agent's report would be subject to modification, subject to reconsideration, subject to redetermination. And because the Commission may have made errors in previous years, those errors ought not to be material evidence in this case.

The Member: I agree with you 100 per cent, Mr. Smith. But nevertheless for the purpose of the record I am going to receive the documents that have been agreed to between you, simply for the purpose of completing the record.

Mr. Smith: And they are received only for that purpose?

The Member: Well, I have indicated my thoughts and of course the Board has ruled many times that matters of this sort are not at all binding on the Board. I am really accepting them for the purpose of forestalling any higher courts from saying that I have excluded what the higher courts considered as competent evidence.

Mr. Smith: Then merely for the purpose of protecting the record, from our own standpoint, may we have an exception?

The Member: The exception will be noted. This will be received as Exhibit No. 1.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 1," and made a part of the record.)

Mr. Carpenter: I now offer in evidence a determination by the Commissioner that Section 220 was applicable to this corporation for the fiscal year ending January 31, 1928, and the determination of the Deputy Commissioner on October 13, 1930—the taxable year in question—that after carefully considering the facts contained in the protest and additional facts disclosed at the hear-

ing April 25, 1930, before the office of the General Counsel, "the protest is sustained and accordingly it is held that your company is not subject to taxation for the fiscal year ending January 31, 1928, under Section 220 and 104 of the Revenue Acts of 1926 and 1928,"

I may indicate to you that so much of this statute operates upon the intention and purpose of the taxpayer that I think it is quite material for us to make that showing.

Mr. Smith: Can we make the same objection as previously made to Exhibit No. 1?

The Member: Yes. And the record will show an overruling of the objection and exception noted. The paper will be received in evidence as Petitioner's Exhibit No. 2, merely for the purpose of completing the record.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 2," and made a part of the record.)

Mr. Carpenter: I am making only the offer of one copy. How many additional copies should I file?

The Member: That is all that is necessary, in exhibits.

Mr. Carpenter: I now offer in evidence the certified copy of the certificate of incorporation of the National Grocery Company and the amended certificate. It was originally incorporated according to the certificate on June 2, 1908, with an authorized capital of $5,000 divided into 50 shares of par value of $100. each.

And then in the year 1911, that certificate was amended and increased the capital stock to $200,000 authorizing it generally to do a grocery business.

Statement of Evidence and Exhibits 1-24 Inclusive and "A".

The Member: Without objection that is received in evidence as Petitioner's Exhibit No. 3.

(The document referred to was received in evidence and marked "Petitioner's Exhibit 3," and made a part of the record.)

Mr. Carpenter: I now offer in evidence a table which is made up from the books which I have shown to government counsel and changed somewhat to meet their views, and this shows that the year 1908 to January 31, this year, inclusive, every year—these items: First, the number of stores in operation. And right here I may indicate to your Honor this fact, that this is the first case that to my knowledge has been tried where the taxpayer tried under this section was a real business enterprise, incorporated long before the statute or any income statute was passed and I cannot ever say it was formed for the purpose of evading taxes. This is a corporation which, through active actual business operations and through accumulating its surplus, keeping all its earnings in the business, having nothing added to it by way of additional capital or securities deposited with it, had actually grown from three groceries in 1908 to 815 grocery stores at the end of the taxable year in question, through the principal, the only stockholder, Henry Kohl, leaving in the business its earnings and profits, and drawing just enough for his own personal needs, the business grew to those proportions.

Its net profits in that time grew from $4,500 per annum to the taxable year in question when they were $682,000, as apparent by the statement made up according to the income tax laws.

But we will show you as we go along that at the end of that year, the corporation was in worse condition than it was at the beginning of the year because of the depreciation in inventory, in property, and particularly in the securities that it had bought out of its accumulated funds. So that while we show an apparent net addition to capital and surplus for that year of $682,000, we will show you as we go along that the depreciation was far in excess of that.

This statement, among other things, shows that Mr. Kohl's total salary, withdrawn from this business, from 1908 to the year 1930, the end of that year, was $1,026,000. The total Federal tax paid by the corporation in that same period was $1,842,000. The total net profits, per the books, was $8,085,000. The net additions to capital and surplus were $8,035,000. The other taxes they have paid to the state and municipalities aggregated $472,000.

Mr. Kohl's personal income taxes which he paid aggregated $109,815. Those figures I gave you were the totals according to this statement at the end of the fiscal year 1932. From that date on down to this date the total salary drawn by Mr. Kohl was $1,424,000. The total Federal taxes paid were $1,900,000. The net profits as per the books were $9,400,000. I am leaving out the odd figures. The total dividends declared from the beginning of the corporation to date were $850,000. The net additions to capital and surplus were $8,576,000. The total other taxes, real estate, personal and so forth paid by the corporation were $816,000. Total personal income taxes paid by Mr. Kohl, $407,000.

The recapitulation shows that the total taxes paid to the government by Mr. Kohl on the busi-

ness aggregated $2,367,000, whereas the total he withdrew from the corporation in salaries and dividends is $2,200,000—or an excess in taxes paid of $100,000.

Mr. Smith: If your Honor please, at this time the respondent objects to so much of this exhibit as appears subsequent to the close of the year January 31, 1931, for the reason that it is immaterial and irrelevant to the issues in this case. We contend that which took place subsequent to this year in question can have no bearing on the intent of Mr. Kohl or the National Grocery Company, either as to the distribution of dividends or otherwise, as far as the year in question is concerned. It can have no bearing on unreasonable accumulation of surplus for the year in question. For that reason we object on the ground that it is incompetent, irrelevant and immaterial—all that appears on here with reference to what took place subsequent to January 31, 1931.

The Member: That is the only portion of the exhibit you are objecting to and you are objecting to it only on the ground that it is incompetent.

Mr. Smith: On the grounds stated, as having no bearing either on his intent or the unreasonableness of the accumulation prior thereto.

The Member: For the purpose of the record the objection is overruled and the document is received as Petitioner's Exhibit No. 4.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 4," and made a part of the record.)

The Member: I agree with you, Mr. Smith, however, upon your statement of the case. I feel personally that it does not have any bearing.

Mr. Smith: May we have an exception?

The Member: Exception noted.

Mr. Carpenter: I now offer exhibit prepared by the government. This shows an analysis of the surplus. We have checked it and find it accurate and as I have agreed with Mr. Smith to have the entire picture before you to present this in its present form.

The Member: Received as Petitioner's Exhibit 5.

(The document referred to was received in evidence and was marked "Petitioner's Exhibit No. 5," and made a part of the record.)

Mr. Carpenter: I now offer in evidence a copy which happens to be a photostatic copy of the balance sheets of this corporation for the year ending February 1, 1908—the fiscal year—is that the date —to the fiscal year ending January 31, 1936, giving all of the figures on the balance sheets as per the books. There will be found to be a slight difference between the surplus shown on this balance sheet and the surplus shown on the government statement which I have just put in, but I will have that explained by verbal testimony of witnesses later on. This, I may say to your Honor, pretty clearly shows the growth of this business through the policy that was adopted by Mr. Kohl over the years that he has operated it.

I have submitted this likewise to government counsel and I think they have agreed.

The Member: Received as Petitioner's Exhibit No. 6.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 6," and made a part of the record.)

Mr. Smith: Now, we, the respondents, object to so much of this exhibit as relates to the years subsequent to January 31, 1931, on the ground that it is incompetent, irrelevant and immaterial.

The Member: Objection overruled and exception noted.

Mr. Carpenter: I now offer in evidence a statement showing these facts from the year ending January 31, 1908 to January 31, 1936. It shows these figures:

The number of stores operated, the increase or decrease over the preceding years, the gross sales per annum, which I may say to your Honor ran from $181,000 in the year 1908 to $25,142,000 in the year 1930—the year in question. It shows the net profits per the books as net taxable income for each year. I may point out that for the last four years the statement shows that the net profit, net taxable income as shown, is as reported on the Federal income tax returns filed. They have not yet been audited by the government.

Mr. Smith: We make the same objection as previously made with reference to the years subsequent to January 31, 1931.

The Member: Objection overruled and exception noted. It will be received as Petitioner's Exhibit No. 7.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 7," and made a part of the record.)

Mr. Carpenter: I now offer a statement which has been prepared from the books, at the request of the government, to show this information: For the years ending January 31, 1926 to date, the number of stores opened per annum, the number

of stores closed, the net increase or decrease, and the number of stores in operation at the close of the fiscal year. Counsel for the government has some reason for asking for that information and we have procured it.

The Member: It will be received and marked Petitioner's Exhibit 8.

Mr. Snith: I make the same objection with reference to all of those years subsequent to January 31, 1931.

The Member: Objection overruled and exception noted.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 8," and made a part of the record.)

Mr. Carpenter: I now offer a statement showing the number of employees at the National Grocery Company for the years 1924 to date and the total wages paid the employees per year, which shows that for the year in question the number of employees was 2,332 and the total wages paid was $3,132,891.

Mr. Smith: We make the same objection with reference to those years subsequent to January 31, 1931.

The Member: Objection overruled and exception noted. It will be received as Petitioner's Exhibit 9.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 9," and made a part of the record.)

Mr. Carpenter: I now offer a sheet showing the purchases, the discounts and the rents paid by the National Grocery Company for the years

ending January 31, 1926 to date, which show for the calendar year in question, for instance, that the purchases of merchandise for that year were $19,993,937; the discounts taken by the corporation by the use of its capital in discounting bills, which by the way paid taxes, were $493,719. The total rents paid on rented store properties $929,918.

Mr. Smith: I make the same objection with reference to the subsequent years beyond January 31, 1931.

The Member: Objection overruled and exception noted. This will be marked Petitioner's Exhibit 10.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 10," and made a part of the record.)

Mr. Carpenter: I now offer in evidence a statement that was prepared at the request of counsel for the government showing the loans made by the corporation to Mr. Henry Kohl, the sole stockholder, on which no interest was ever paid, shows no interest was ever paid, charged or accrued on the books. That from 1922 down to date. And I call the Court's attention to the fact that although for the year 1930 Mr. Kohl borrowed $140,000 on notes, those were all paid as shown on this statement at various times since out of his earnings.

Mr. Smith: No objection to that.

The Member: Received as Petitioner's Exhibit 11.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 11," and made a part of the record.)

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Mr. Carpenter: I now offer in evidence a statement prepared for counsel for the government showing the application of the dividends received by Mr. Kohl to various amounts and how those dividends were paid. They were all paid by checks excepting a dividend that was declared on March 23, 1931, and that dividend was paid, $40,000 by check and $60,000 by a book entry which credited notes receivable by $60,000 on March 20th and the $40,000 check was given on March 17, 1931.

There is a difference, you will see. The statement shows the dividend was declared on March 23rd, whereas the check was given March 17th for $40,000 and the credit was on March 20th. But later on I will show what actually happened. It was done pursuant to instructions issued and not approved, really, until a later meeting.

The Member: Received as Petitioner's Exhibit 12.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 12," and made part of the record.)

Mr. Carpenter: I now offer a statement showing basis for the insurance reserves for the year ending January 31, 1931. I call your Honor's attention to the fact that on the balance sheet which shows that the corporation carried reserves for insurance starting some years ago. In other words, they become self-insurers for certain lines of insurance and credited to that reserve account the premiums charged by the straight line insurance companies for the kind of insurance they self-insured. This statement shows that for the year in question, 1930, they carried self-insurance

on 800 stores—fire, merchandise and fixtures, public liability and property damage, fidelity bonds, burglarly on merchandise and cash, hold-up, plate glass, forgery; carried self-insurance on motors against burn-outs and mechanical accidents and full coverage collision on all of their automobiles.

They carried their own sprinkler leakage insurance on 300 Mercer Street (their office building), and insurance on merchandise in transit. This, in other words, states the total. This is the insurance they would have paid to other companies had they not self-insured.

The Member: Received as Petitioner's Exhibit 13.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 13," and made a part of the record.)

Mr. Carpenter This business, if your Honor please, from time to time has borrowed money from banks. Here is a schedule I have had made up from the books showing notes payable from the business from January 24, 1925 to date and showing the rate of interest charged by the banks on these notes. This was prepared at the request of the government.

The Member: Received as Petitioner's Exhibit 14.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 14," and made a part of the record.)

Mr. Carpenter: I now offer a schedule of the securities holdings of this corporation as shown in the balance sheet in totals as of January 31, 1930 and January 31, 1931. The schedule shows

the individual security, the number of bonds or stocks held, the market price on January 31, 1930 and on January 31, 1931, the beginning and end of the year, and the cost prices at the beginning and end of the year, there being some additions during the year by way of purchase or sale. This has been submitted to the government and they have checked it completely, but they have—but they are not satisfied with a few of the market prices we have there. Mr. Kohl, for instance, bought stocks in Jersey City banks where he had been doing business for years. There is quite a difference between the price that the government put on one or two of those stocks and ours. Ours are taken from the dealers and obtained by the dealers of securities who appraised them in Jersey City—specialists in those securities, and their man will be here later in the day to testify and to substantiate these prices. I may say that this schedule shows that for the taxable year in question the depreciation in the value of these securities between the beginning and the end of the year was $943,517.42, or a sum in excess of the apparent net earnings of the business for that year.

The Member: Are you objecting to that exhibit, Mr. Smith?

Mr. Smith: No.

The Member: It will be received in evidence as Petitioner's Exhibit 15.

(The document referred to was received in evidence and marked "Petitioner's Exhibit No. 15," and made a part of the record.)

Narrative statement of the testimony produced before Honorable Charles P. Smith, Member of

the United States Board of Tax Appeals, taken at New York, May 7, 1936.

Twenty-four exhibits were offered in evidence by the petitioner, marked 1 to 24, respectively.

Eleven exhibits were offered in evidence by the respondent, marked A to K, inclusive.

Mr. Henry Kohl, a witness on behalf of the petitioner, being duly sworn, testified: I am sixty-five years of age, was born in Germany, and came to America in 1887, without any money or property. I first entered the grocery business as a clerk in Brooklyn, and went to Jersey City in 1889, where I was employed as a clerk in a grocery store. In 1891 I bought one store for $500. I had saved $217 during my time as a clerk, and persuaded a friend to go into the business with me; together we paid $250 in cash and $250 in notes for the store, and what little cash we had left over was our working capital. The store was in a poor section of Jersey City and I looked about for another store, and bought a second store for $250 gross, paying $125 in cash and $125 in notes. My partner ran one store and I ran the other. The partnership was unsatisfactory, so the partnership split, I taking one store and my partner the other.

By 1900 I had purchased two stores in my own name. At this time I did business like all other stores, except that I gave trading stamps to my customers. I was the first man to use trading stamps in grocery stores. I delivered goods on credit, made deliveries to purchasers, and in short did business like all other grocers. I had very few friends who were willing to stick to me or help me. During my early years I lived in the back of the store, cooked my own meals, and lived "like all poor devils do." Some times I had

credit and other times I had no credit. "If I was overstepping myself, naturally my credit was not so good. If I was keeping in a shell, naturally my credit was good." I drew from the business in the early years nothing but a bare living.

In 1906 I had three stores and that year formed Henry Kohl Company, a New Jersey corporation, and did business under that name until 1911.

In 1908 the Henry Kohl Company lost $4,000. Its assets were about $20,000 at the beginning of the year, and only $16,000 at the end of the year. Because of the trading stamps and selling on credit, I was going backward and was needing money. I worried very much because I worked very hard. "I prayed awfully hard—until I got this idea of the cash and carry stores, which was the original idea in the United States." After getting the idea of the cash and carry store, I opened one store as an experiment in Jersey City under the name of National Grocery Company. The difference between that store and the stores owned by the Henry Kohl Company was the way I handled merchandise. There was a lot of dishonesty in the grocery business prior to that time, and people never got what you call a square deal in a grocery store in regard to coffee, butter, spices, extracts, etc. They were adultered, were sold from old tin cans; extracts were adultered; coffee was largely chickory; goods were sold on credit, and my losses were large. When I opened my first cash and carry store I handled nothing but the best merchandise. I handled nothing but pure spices, coffee, extracts, etc., and put them in nice little tin cans. I sold only one price coffee, and that to the rich and poor alike, seventeen cents a pound, three pounds for fifty cents. "There

is not a pound of chickory sold in the United States as coffee because I threw it out."

In the cash and carry stores the goods were so arranged that clerks could handle them quickly and wait on customers quickly. I did away with chairs in front of the counters; I did away with telephones and taking orders. A woman came in, bought merchandise, paid the price, and took it away with her.

The cash and carry store business was new and it took the women sometime to get the idea. My idea was that a woman who paid cash and was willing to take the goods home was entitled to a cheaper price. Then people who bought in the cash and carry stores saved almost fifteen per cent as against buying in the old time stores. Fifteen per cent was the difference in overhead between the old time stores and the cash and carry stores.

After about six months the first cash and carry store began to do a great deal of business. I then opened two additional cash and carry stores under the name of National Grocery Company, and in 1908 incorporated this business into the National Grocery Company. At the same time my three old stores were running under the name of Henry Kohl Company.

In 1911 I merged the National Grocery Company and the Henry Kohl Company under the name of National Grocery Company. After this merger I had fifty-seven stores. It is quite a question how I financed the additional stores. I did it by using all of the money that I could borrow and what little money I made in profits. I never sold any stock or bonds. In the early days I tried to sell stock or bonds in Wall Street, but I was not

welcome there and was unable to raise any money by that kind of financing. As time went on and by the method of keeping all of my profits in the business, except what were necessary for my bare living expenses, "I was independent and did not want to sell it." In the early years I needed very little money and drew very little money out of the business, and confined my drawings to my bare living expenses.

About 1911 or 1912 I purchased a lot on Montgomery Street, Jersey City, and later erected a warehouse for the uses of the business. A year or two later I bought a stable to house the horses and wagons used in the business. These buildings are still in use by the Company.

I expanded the business year by year, really quicker than I could afford, and financed the expansions with the profits I made from year to year, leaving them right in the business. During the War years the business increased slowly, because I was advised that it was contrary to the policy of the Government to expand this kind of business, and I was encouraged not to invest money in expansion. It was the policy to invest money in Liberty Bonds, and I did that and did not open any stores. The Government wanted everything confined to War activities, rather than the expansion of private business.

About 1915 the National Grocery Company erected a bakery to bake the bread that it sold in its stores. About the same time also the National Grocery Company built a garage next to the bakery. These were located at Montgomery and Mercer Streets, near the old warehouse to keep the business centralized. I have tried several times to buy an adjoining lot for expansion purposes, but the owner would not sell it to me.

The buildings aforementioned front on Mercer and Montgomery Streets, Jersey City, and occupy a large part of the block between those streets. Since the bakery was completed it has supplied all of the bread and a large part of the cakes that we have sold in our stores. At one time we sold as high as forty thousand loaves of bread a day. This was before the depression. At this time we sell about twenty thousand per day. At this time we are putting in all new machinery in the bakery at an expense of about $150,000. It will aggregate that when we are finished.

In 1923 the National Grocery Company built an additional warehouse and office building on Mercer Street, across the street from the old warehouse building. We had plans drawn for a ten story building, but when we received estimates of the cost, we found it would cost too much money, and I had the plans drawn for a six story building, which was promptly erected.

The National Grocery Company had in mind opening more and more stores. I always had great big ideas. To carry them out is another question. We wanted more stores, naturally. Our system was right and the public wanted them, but we could not carry it out all the time. Competition came, but we wanted plenty of stores. We had to have a certain amount of capital in order to have credit. Your credit depends on your statement. "If you don't have a decent statement you cannot buy your merchandise right or do anything right." The National Grocery Company had to buy large quantities of merchandise all the time. Ever since we have been able to discount our bills we have been doing it. It is a very important thing in our business to get the discounts

and pay cash for merchandise. That is the inner profit of the business.

For the year 1930 the discounts amounted to $434,000. The purchases for that year were in excess of $19,000,000, and the discounts were almost two per cent of that figure. In order to make those purchases and take our discounts we had to have large capital.

It has always been our policy to rent our stores and not own the real estate on which they are located. All of the eight hundred odd stores that we had in 1930 were rented, except one. The rents were payable monthly in advance, and the leases were not long. Years ago we had very long leases, but lately we do not take long leases. Of recent years we have taken one year leases, with the privilege of three or four years' extension, at our option.

We have a building called the return building located on Mercer Street, to which we take all of the "returns" from the grocery stores. I am the originator of this idea connected with the grocery business. Years ago the grocery men used to give away boxes or sugar barrels, etc. I clean my stores out twice a week, so that the stores are kept clean of rubbish. That is returned to the return room and separated, and the bags, barrels, etc. are sold. This might be called a salvage department, and its operations have increased our profits considerably.

In 1930, as well as at this time, there has been little change in the cost of opening stores. Fixtures these days are high. We are spending a lot more money than we used to. The cost is $2200 to $2500, maybe more, per store. We have to have $400 or $500 cash to run the store—cash in bank,

and including everything you have to have about $5000 per store.

The manager in each store deposits the money in bank every day. We carry one hundred or more bank accounts, in which our receipts are deposited. Our eight hundred stores serve an area within a radius of fifty-five miles, located in the northern part of New Jersey. We have about thirty stores in Staten Island, New York, and some in Nyack, but none in New York City. We have several times made surveys with the idea of opening stores in New York City, and it is our intention to come into New York City. We have had stores in the past in New York and closed them up because they were in bad locations and did not turn out right. I cannot remember the years we closed these stores. In the last two or three years we have had surveys made in New York, with the intention of opening additional stores, but have not done it. Within three years we had the Noyes Company getting us locations. We were not able to find the right sections for our stores. It is very hard.

We have also been on the lookout at all times to try to buy chain stores, but it has not happened. Sometimes it was because they were poor—run down; other times, too high in price. As late as last year we had a large chain of stores offered us for purchase, but did not buy because they did not show a very good investment. We had the money available, but refused to buy because the stores offered were not in a healthy condition, and I did not think it a good thing.

I do not think that in the year 1930 we had more capital and surplus in the business than the business required.

Statement of Evidence and Exhibits 1-24 Inclusive and "A".

In 1929 and 1930 Mr. Bohack of the H. C. Bohack Company in Brooklyn, was alive, and offered to sell me his chain stores, consisting of five or six hundred stores. I considered seriously purchasing a part, if not the whole of the business. We made a careful survey of this business to see if it was profitable for us to buy it, but while the negotiations were pending he became ill and died. These negotiations were resumed as late as last year. The Bohack Company is a large concern. I would not be surprised that it is five or six million dollars.

I borrowed during the fiscal year ending January 31, 1931, from National Grocery Company the sum of $140,000, in sums of $40,000 and $100,000. My health was poor that year and I bought a Winter home in Palm Beach, Florida, and borrowed $40,000 from the National Grocery Company to make the purchase at that time. The sum of $100,000, which I borrowed on January 31, 1931, I used to pay off a loan of $100,000 to the Commercial Trust Company, which money I had borrowed to make a payment of $100,000 to the Jersey City Young Women's Christian Association. The circumstances were as follows:

In 1929 or 1930 the Young Women's Christian Association in Jersey City were constructing a building, and I talked with one of the members of the firm of Colgate & Company about the completion of that building. We had a campaign on and were short of funds. The Colgates wanted me to give as much as they gave. I was in charge of the campaign and I wanted to see the women get the money necessary to complete the building. We were short a couple of hundred thousand dollars, and I told Colonel Colgate that if he would give

half I would give half, so that the women would have the money.

I borrowed $140,000 from the National Grocery Company in the fiscal year 1930, instead of declaring dividends, because it was temorary borrowing, and I expected soon to pay it back. I paid back $100,000 within three months.

I offer in evidence the following promissory notes, all of which were given to National Grocery Company for borrowed money, all of which are paid and cancelled:

July 3, 1928, a note payable to the order of National Grocery Company, on demand, for $15,900; note dated December 26, 1928, for $10,000; note of $10,000, dated December 17, 1929; note dated April 21, 1930, for $30,000, payable on demand; note dated June 16, 1930, for $10,000, payable on demand; note for $100,000, dated January 9, 1931; note dated March 17, 1931, for $40,000; note dated March 15, 1932, for $25,000. All these notes were paid to the National Grocery Company on the dates written on the notes in blue pencil. The statements in evidence show how and when they were paid and from what sources.

In August, 1932, I borrowed $65,000 from the Hudson County National Bank, Jersey City, on my promissory note, and renewed that, month by month, until December, 1932. The day I borrowed this $65,000 from the Hudson County National Bank I paid that amount on account of my loans to the National Grocery Company.

In 1930 general business conditions that year were not good. Everybody knows that. The value of assets that year in every business was shrinking. Our merchandise inventory, and everything else, was going down. Everything

was declining in value. The reason I borrowed from the Company was because I expected to pay it back, and it was the quickest way I could get the money I needed. I have always been proud of the statement of the National Grocery Company and I was very careful not to injure it at any time. If I borrowed the money from the Company and gave it my note, it would not have any effect on the Company's statement, whereas if I declared a dividend, the money would go out of the Company. I kept all the earnings in the business because "I needed them in the business —always needed them in the business. I never had any too much money in my business. That was my judgment." The construction of the buildings and the bakery was all financed out of the earnings of the business. Even with all the capital that the Company had we had to borrow money from the banks occasionally as it was needed. We needed it to buy butter and eggs and put them in storage, and to buy merchandise when it was the right time to buy. Frequently you need more money that you have got. It takes all of the money we have got to swing that. We buy butter every day, but in June we buy butter for the next Winter.

"Q. How about coffee—do you buy that in large quantities? A. That all depends.

Q. On what? A. If war were declared tomorrow we would buy a year's supply and would be fortunate to have the money to do it with.

Q. How about sugar? A. Well, sugar, too. Years ago we had the same thing. Ordinarily we don't buy it that way—we buy it regularly.

Q. Do you buy any merchandise abroad? A. Not very much—no.

Q. But you hold yourself ready with the cash to buy if necessary a whole year's merchandise if you think you can make money by doing it? A. Certainly, at all times.

Q. And in your judgment do you have to be in that position to be able continuously to supply 800 stores with merchandise? A. Well, the more money you have got the cheaper you can buy and the more independent you are and the more you are recognized—and everything depends upon your statement."

It has been the habit with us to keep in the business every possible dollar, and let that accumulate for the benefit of the business. I think it is good business judgment and I guess everybody else does. The bankers tell you that. If we had adopted a different policy and in the good years from 1920 to 1930 had drawn out of the business a large part of our profits, I do not think we would have been able to withstand the effect of this depression the way we have. I think those concerns who did do that have gone.

Cross-examination:

At the close of January 31, 1931, I owed the Company $610,000. I do not remember when I began borrowing from the corporation. I do not know whether I paid back the first loan. I do not know whether any loan that was made prior to January 1, 1931, had been paid before January 31, 1931: I do not remember whether I paid interest on my loans. I think some notes bore in-

terest and some did not. I do not know why they did not bear interest. I do not know why if the corporation needed the money I did not pay interest. I do not know if it needed the money. Then we needed the money for expansion. I do not know why I did not pay the notes in full. I do not remember whether the Company was borrowing from the banks in 1929. When I borrowed money from the banks I paid interest. When I borrowed the $140,000 from the corporation in 1930, I do not know if I claimed as a deduction in my income tax return a contribution to charity.

I made a survey for the extension of our business of chain stores in New York about fifteen years ago. We closed up the stores about a year after we opened them. I did not make another survey in New York until about three years ago, but we opened stores right along in Jersey.

The assets of the National Grocery Company began to decline in 1931—I guess in those days after '29. Up to '29 there had been a gradual increase in value. I declared no dividends then. After 1931, or '29, I declared no dividend. We declared a dividend in 1932.

"Q. So that as far as your business is concerned, the increase in value of your assets and the decrease in value of your assets had nothing to do with your declaration of a dividend? A. Practically speaking, no.

Q. What was there about your business that would lead you to declare a dividend in 1932 rather than prior to January 31, 1931? A. I think it would be advice of counsel, no doubt.

Q. Now, in 1933 there was a declaration of a dividend of $100,000; in 1934, another

dividend of $100,000; and in 1935, $200,000; and in 1936, $200,000. Now, what was there about your business in those years that led you to declare those dividends? A. Well, in the first place we could afford to pay a dividend.

Q. But three years ago you were planning an extension of your business and you were making surveys, is that right? A. Yes.

Q. And yet you were declaring dividends of $100,000 and $200,000. A. Well, we didn't spend anything. We could afford it.

Q. Couldn't you afford it in 1929? A. I do not think we could afford it in 1929."

Our sales were greatest in 1929 or 1930. Our book accounts were greatest in the years we did the most business.

Re-direct:

I did not refrain from paying dividends in the National Grocery Company in 1930 in order to avoid the payment of any government taxes. I have never done that.

"The Member: I notice from one of the exhibits here that the corporation had on hand investments in stocks and bonds on January 31, 1931, which cost the corporation $2,989,000 odd. Why did the corporation make investments in all those different kinds of stocks and bonds?

The Witness: To invest that money so that when we would need it we would have it. All corporations do that more or less. * * * We wanted to use it all the time. It was invested because we wanted to have the cash on

hand. And those were the days there was very little investment. We had to have the money ready. What will you do with it if you don't invest it? * * * It was part of our business. We carried that money, of course, principally to have the money on hand and get something for it. At the banks you would only get 2 per cent at that time. Of course, you don't get anything now. So we bought some stocks and bonds which we could turn over. You know, you can turn that stuff over in the morning, in a couple of hours, and you have your money if you want it."

The money was invested that way so that whenever we needed the money we could sell the securities and get the money. All corporations do that.

Re-cross:

I do not know whether the securities were ever pledged as collateral on our loans from the banks, but they always showed as a credit on the Company's statement. The credit of the Company was not always good. I do not know whether in the years from 1925 to 1931 we had to place any of our securities as collateral with the banks; I don't think I did.

Re-direct:

The credit of the National Grocery Company was always good according to my opinion, but not to the other fellow. In the early years when we went to the banks to borrow money I had plenty of difficulty in getting credit. I found from actual experience that having those securities in

the statement of the National Grocery Company enabled the Company to get credit at low rates where we had been unable to do that in the earlier years.

Anna Mullins, a witness on behalf of the petitioner being duly sworn testified:

I am Treasurer of National Grocery Company and have been associated with that business and with Mr. Kohl since 1897. At that time he had one store.

A comparison of the built-up balance sheets from the beginning to date, when compared with the statement of the surplus that the Government prepared, shows a difference which is principally taken care of by the adjustments that were necessary after an examination of our returns. For instance, the insurance that we had charged to our expense account was disallowed, and the income tax reserve that we had charged to taxes was disallowed, and any other minor adjustments, like prepared payrolls. Those were the only ones. The built-up balance sheet is per our books, and the other is per the tax return after the audit.

It has been Mr. Kohl's policy from the formation of the business that he could make more money by reinvesting the earnings in the business than in any other type of investment. The reason the National Grocery Company invested money in a diversified list of stocks and bonds, was because the cash was always available when it was invested in that type of securities and meanwhile was earning money. The Company has never been financed or expanded through borrowed money. We have never borrowed money except on short term borrowings. The Company has never sold any stock or bonds to the public. All the ex-

pansions of the business have been out of earnings. I am one of the stockholders.

When Mr. Kohl had one store he promised me he would have ten some day. After he had ten and he thought if I would stay a little longer maybe he would have a hundred, and that has always been his policy right along. Then as the money accumulated there was some competition that was troublesome and he expressed a desire to be able to buy them out some day.

I believe in 1919 we had two hundred stores. At that time Mr. Kohl was figuring on having a thousand. When he got up to six and eight hundred stores his plan was to have two thousand stores. Our present warehouse was built to take care of between 1500 and 2000 stores. The present warehouse was built in the late twenties, and is a six story building. The bakery would supply probably one thousand stores in its capacity when built, but we are in process of rebuilding that now in order to put in modern machinery to take care of the stores that we hope to open. When the present machinery is installed it will double our present output. As far as the size of the building goes, the ovens and machinery will supply fifteen hundred stores.

Mr. Kohl borrowed from the National Grocery Company $100,000 in the fiscal year 1930 to pay a note in the Commercial Trust Company for $100,000 that he took out at the time he paid his donation of $100,000 to complete the big building for the Young Women's Christian Association on the hill in Jersey City. To make that gift he borrowed $100,000 from the Commercial Trust Company, and paid his gift with the borrowed money, and he later borrowed from the Grocery Company

enough to pay that note. The reason he borrowed from the Company, instead of declaring a dividend was that he expected to pay that back, and it would not depreciate the surplus account, but had he declared a dividend that was then out of surplus and might have hurt our credit. It has always been his policy to keep in the business every possible dollar that he did not need for living expenses.

"Q. Was it ever his purpose as expressed to you, as far as you know, not to pay a dividend to avoid any taxes? A. It was not."

My duties are to assist the President, have charge of the office and office force, and assist the Vice President in the rountine operation of the business. Everything in connection with the operation of the business comes to my attention. All of the buying is reported to Mr. Kohl and I get it from his reports. I have direct supervision of the employees in the office, and indirect supervision in the warehouse.

It is my opinion, as Treasurer of the Company, that in the year 1930 the surplus was not in excess of the reasonable needs of the business, and is not today, although conditions are different. In order to finance the purchase of $20,000,000 worth of merchandise and pay a million dollars in rents per annum, the Company required its surplus, in my opinion. There were times even at that when we were short of cash, and had to borrow temporarily from the banks in order to pay for incoming merchandise.

We had discussed from time to time Mr. Kohl's negotiations for the purchase of other existing chains of stores. I heard about the conversations

with Mr. Bohack in 1930, but I did not attend the conferences. A little more than five or six years ago Mr. Kohl contemplated the purchase of another chain of stores, one chain being in Paterson. That matter came up several times. That might have been around 1929 or 1930. The other chain was earlier than that.

In 1930 there was under contemplation the expansion of the business by the opening of a chain of stores in New York after the opening of the George Washington Bridge. We figured it would be a little cheaper to deliver merchandise and quicker to deliver it since the George Washington Bridge was open than by ferry. In the course of our business we should have our stores within easy trucking distances of the central warehouse. Our purpose in expansion is to keep within trucking radius of our central warehouses. There were so many surveys made with the idea of our opening a chain of stores in New York City, that I would not be able to tell in what years they were made. That has been constantly in the minds of Mr. Kohl and myself for many years. Every time anybody came to New York and saw the business that was there, and we were so close to it, we hoped some day to get that business. Every time our store superintendents or real estate department made investigations we found the rents were prohibitive for our type of business. It is a matter of cost and expense. We have the ability to finance and have maintained our ability to finance expansion as, if and when the time is ripe, either by buying an existing chain or by buying new stores. That has been Mr. Kohl's purpose in keeping the surplus in his business.

In the year 1930 Mr. Kohl borrowed from the National Grocery Company $140,000. At that time

Mr. Kohl developed a heart condition. His health was failing and that year he purchased a home in Palm Beach, Florida, and borrowed the money from the corporation to pay for the house. All of that money has been repaid to the corporation.

Every time Mr. Kohl borrowed money from the National Grocery Company, the amount loaned him was entered on the books under the head of "notes receivable", and every borrowing is shown on every statement that the Company has made.

I produce a memorandum from myself to my assistant, Mr. Botti, dated March 16, 1931, reading as follows:

> "The National Grocery Company has today declared a dividend of $100,000 in favor of its present stockholders. $60,000 of this dividend is to be credited to Mr. Kohl in the bills receivable account in payment of $60,000 of his notes and $40,000 check to be drawn to the order of Mr. Kohl and deposited to his credit in his account in the Hudson County National Bank."

This was the order for the entries to be made on the books. The Directors' meeting that declared this dividend was held three or four days later.

In the year 1930 there was a general decline in the market value of all assets, including our inventory of merchandise, our inventory of groceries, and our inventory of securities. I am not positive as to the extent of the decline in our merchandise inventory, but as far as I recall, it was between $200,000 and $250,000. At the end of the year we had at least as much merchandise to serve the stores as we had at the beginning of the year, if we had as many stores, but I believe we had more

stores. As I recall we carried an inventory of merchandise of about two and one-half million dollars. Of this about $700,000 or $800,000 was in the stores, I think, and the balance was in the central warehouse, with the possible exception of what might have been in outside warehouses.

Although the number of stores has declined somewhat, the reason is due to just the general depression. We would like to expand the business just the same.

Referring to the discounts taken, we have always followed the practice of taking discounts.

We have followed the practice of self-insuring some of our lines. The insurance reserves shown on our statements are computed on whatever the rate would be to insure the item or commodity in a regular insurance company, and that is set aside as a reserve. Any losses against the account are charged to that reserve. If we should have a batch of bread go wrong and people should be injured and start suit against the Company, that would be against the reserve. Suits against the Company for alleged improper merchandise, or breach of warranty, are not insured in outside companies, but would be charged against the reserve. We have had such suits brought against the Company. We insure the merchandise in the central warehouses against loss by fire in outside companies; that is because the large risk is concentrated in one building. Public liability insurance on our trucks is also covered by an outside company.

The reserves for income taxes that are not presently carried, but are shown on our older balance sheets, were carried because there was an assessment undetermined, and the various adjustments from different years have been taken out of that reserve.

Statement of Evidence and Exhibits 1-24 Inclusive and "A".

Somewhat over one hundred thousand persons per day enter and leave the various stores of the National Grocery Company.

Mr. Kohl never put anything into the business in the way of securities or contributions to the capital from the time the business was incorporated to this date. In other words, there has been nothing put into the Company, except what was contributed in the way of he original three stores when the National Groce Company was formed in 1908, and the stores that were in the Henry Kohl Company when it was merged into the National Grocery Company in 1911. All the rest of the surplus has been built up out of the earnings of the business.

Cross-examination:

I really don't know when the George Washington Bridge was officially opened. I don't know when the construction began. I could not tell you when Mr. Kohl made his first survey of business in New York. Mr. Kohl has been thinking of going to New York for many years. He made one attempt that was unsuccessful. That was before the Bridge was thought of. The first survey was made, I believe, about the time when the Washington Bridge was an assured thing. I have no idea how many years ago that was.

A dividend of $100,000 was declared by the National Grocery Company shortly after and about two months after the close of the fiscal year in question. I don't suppose that one dividend hurt the credit. The next year the National Grocery Company declared another dividend of $100,000. I think as it went on (payment of dividends) it did hurt our credit. I think that both the divi-

dends and the condition of the market added to hurting our credit.

$800,000 in dividends between January 31, 1931, and January 23, 1936, is a considerable sum, and yet we are figuring on expansion. We were figuring on expansion at the time we declared the first $200,000 dividend.

Prior to 1929 and 1930 market values of our assets had been going up. Values were increasing. Previous to 1930 we declared no dividends, except the two $25,000 dividends. Neither the rise nor fall in values affected the declaration of dividends. The market value of assets did not have any influence on the declaration of dividends.

It was my error that interest was not collected from Mr. Kohl on his loans. I ignored the fact that some of his notes were interest bearing, and some were not. I will have to take the blame for that. He did not pay any interest on any of his loans. By the close of 1931, Mr. Kohl had borrowed $610,000 from the National Grocery Company over a period from 1921, on which he had not paid one single penny of interest. There is owing to the Company still by Mr. Kohl on his loans over $400,000. He is not paying interest now.

Re-direct examination:

In the year 1930, while the declines were going on in the list of securities, I kept an accurate watch and reported to Mr. Kohl how they were sliding in value. They were watched every four weeks right through that year. Prior to January 1, 1930, we only made an observation as to the market condition of securities at the termination of the years previous to the crash in the market, but during the year 1930, when the values slid so rapidly, we watched the prices every four weeks.

"Q. You have been asked, Miss Mullins, by counsel, about the declaration of dividends since 1930. Why did the policy change after that instead of not declaring them prior to that? A. Well, of course, we know how the government felt about surpluses and we were advised that although we needed the money for expansion, just as badly as we did previous to that time, it was deemed advisable to save ourselves trouble like this, and declare it anyway even if it hindered expansion."

Re-cross examination:

I studied the income tax law prior to 1931, and assisted in making out the returns both for the corporation and for Mr. Kohl, and knew of the existence of Section 104 of the Revenue Act of 1928, and Section 220 of the previous Revenue Acts.

The gross sales from year to year were practically for cash. The amount of sales that were not for cash would not amount to very much comparatively.

Re-direct examination:

I also knew, from my knowledge of the Revenue Law, that the Commissioner of Internal Revenue had decided that up as far as 1928 the National Grocery Company did not have an excessive capital or surplus.

William J. Field, a witness on behalf of the petition, being duly sworn testified that he resides in Jersey City, is President of Commercial Trust Company of New Jersey, and has been for twelve years, and has been in the banking business for forty-six years, and is a former President of the New Jersey Bankers Association.

He has known Mr. Kohl since about 1900 or 1901, and the National Grocery Company since it was incorporated.

I have made an examination of Exhibit P-6, the built-up balance sheet of the National Grocery Company, and also the statements of the increase of the corporation's surplus, amount of taxes it has paid to the Government, net profits, and amount of salary paid to Mr. Kohl, and I have made a study of these exhibits. I am familiar with the fact that in the year 1930 Mr. Kohl paid himself a salary as President of the Company of $104,000, and that the Federal taxes the Company paid that year were $103,616, and that the net addition to the capital and surplus, as shown by the tax return for the year, was $682,850, and that the securities owned by the National Grocery Company depreciated in value during that year in excess of $900,000.

When asked whether in his opinion the capital and surplus of the National Grocery Company for the calendar year ending January 31, 1931, was in excess of the reasonable needs of the business, Mr. Field testified:

> "I don't think it was in excess of reasonable requirements and reasonable safety of the business. The working capital at the end of 1930 was $3,700,000 odd. The working capital at the end of January, 1931, was $4,500,000. We were starting on a panic or panicky conditions. No one could foretell the future at that time. The National Grocery Company had a turnover of from six to eight times its capital in the volume of business it did in those years. It is true that some of the other chain stores in the grocery lines had a turn-

over of from 10 to 12 per cent, but the National Grocery Company showed a much safer condition by turning over at a smaller percentage than the other companies. They had experience in previous years of rather large losses on inventory, and naturally they should keep a considerable working capital and a surplus to meet any additional losses they might encounter. . . . This company had accumulated a surplus, a good part of which was invested in stocks and bonds. After the depression, in 1929, these securities went off very considerably in market value. Many of them were what was known as over-the-counter securities. There was a large proportion of bank stocks and it was found they went off in market value, bank stocks outside of New York City could not be sold even at the so-called market value in those times—the conditions that prevailed with bank stocks or stocks of banks located outside of New York City.

This company has been built up since 1908 by an accumulation of profits and has been expanded through that accumulation until 1932. But by adding the profits to the surplus they have gone from three stores to eight hundred odd stores. A company like the National Grocery Company cannot expand unless it covers the total territory that can be covered by a motor truck from its central unit, and to get the full advanage of a chain store business they must cover that territory. As soon as the 1930 depression came, the National Grocery Company having a few over eight hundred stores stopped its expan-

sion and traveled along with about that number of stores.

The idea of putting the surplus—of retaining the surplus in 1930, was no different from any year up to that time. The surplus has always been accumulated for expansion purposes, not only to build up the business but to insure the most economical management of the business, because it could not be carried on successfully unless they had this expansion in number of stores. The stores are a distributing unit of distribution for the central unit.

The accumulation of these earnings in the past years has enabled the National Grocery Company to buy advantageously and always to have a proper working capital, although in several years leading up to 1930 they found it necessary to borrow money in addition to the money that was available. Their accumulation of the surplus, invested in securities, enabled them to show a proper credit statement and hence their ability to borrow whenever they wanted, at low rates of interest."

When asked whether in his opinion for the year 1930, where the Company had a depreciation in value of its securities, and a large portion of these securities were over-the-counter securities, such as bank stocks and insurance stocks, it was good or poor business judgment not to declare dividends, he said:

"I think it was a very wise policy to conserve all of their assets at that time."

When asked how he would construe the fact that Mr. Kohl that year borrowed $140,000 on demand notes from his own Company, he testified:

"I don't think it would have made much difference whether he borrowed the money from the bank or his own company."

I have had a lot of experience with the National Grocery Company over the past years. My bank has had their account for many years. We have loaned them money year after year. We have had reports of the condition of the National Grocery Company year by year, and the fact that the policy of the Company has been to keep its working capital in the business, rather than distribute it, and invest that capital in securities, has enhanced its credit standing very materially to have these securities back of the merchandise inventory.

Mr. Kohl has talked to me once or twice about wanting to purchase other chains of stores, if the opportunity offered. On his behalf, I approached one chain of stores two or three times to see if it was in the market for sale so that Mr. Kohl might buy it, but they showed no evidence of wanting to sell. This was several years ago. I do not recall how long ago.

I remember that after the War, I should say it was in 1920 or 1921 or 1922, when most corporations were writing down inventory, the National Grocery Company had a very large loss due to the decline in the price of sugar. It was essential for the National Grocery Company in those times to have sugar and coffee and so on, sufficient to supply the stores. The only way they could be sure of a sufficient supply was to go to the open market and buy at the prevailing prices, and they had quite a large inventory in sugar. After the War was over these inventories all went down. Almost every corporation was affected the same way. There were tremendous losses in all corporations

through writing down inventories. This Company stood that loss because it had ample funds.

Cross-examination:

I believe that the National Grocery Company has an account with the Trust Company of New Jersey, but I have always understood they have their principal account with the Commercial Trust Company, of which I am President. It is not to my interest today to have as much cash in my bank at all times as possible, but it was up to 1931. The credit of the National Grocery Company has not been impaired at any time from the beginning to the present time. It is as good today as it was ten years ago.

I have a memorandum submitted to me of the number of dividends declared since January 31, 1931. I should not think the payment of those dividends would impair the credit of the National Grocery Company. It has not in my opinion. If the National Grocery Company had declared a dividend of $100,000 in the year ending January 31, 1931, I do not think it would have impaired the credit of the Company at my bank. Had they declared dividends of $100,000 each year from 1925, I do not think it would have impaired their credit at my bank.

The increase in stores from 799 in 1930 to 815 stores in 1931, would have required some increase in capital requirements. I do not think the difference between 815 and 819 stores would be very material as affecting the capital requirements. Between 1930 and 1931 there was an increase of 16 stores. Over the next two years only an increase of four stores. This increase would require very slightly more capital. I think they could have

declared a dividend at the same time, because evidently their policy at that time was not to expand in stores. Although there were 16 more stores in 1931 than in 1930, there was no reason why the Company could not have declared a dividend in 1930 from the standpoint of need of capital, except that because of conditions that prevailed at the time any conservative management would have conserved all of its ready cash, because they did not know what the future would bring forth.

I think the Company could have declared a dividend in 1930, as well as 1931, but with conditions as they were pointing at the time it was much wiser to conserve the moneys than to pay them out in dividends. They could have declared a dividend. That condition began in 1929.

In 1927 the Company had 625 stores; in 1928 715 stores. The reason they did not declare a dividend in those years was because of the need of the extra capital and their policy of continuing an expansion of the stores. They did not know in 1927 that they were going to stop expanding their stores. In 1929 there was the panic and that is when they began to think over the situation. The panic began in October, 1929. I think the Company entirely lost confidence in January, 1931, on account of what had happened in October, 1929. The figures show that they only had four additional stores in 1932, and the number has been falling since then, and the figures show that their policy of expanding stopped. I am judging that mostly from the figures. I have no personal knowledge, excepting the figures. I have read the figures to pass on credits. Eliminating the figures, I have no knowledge of the policy of the Company.

I am aware of the amount of loans from the corporation to Mr. Kohl from 1922 to 1931, merely

from the figures shown on the statements of the Company. I presume that Mr. Kohl's borrowings from the corporation was a good asset for the corporation.

Re-direct examination:

We have considered the item of $610,000 owed by Mr. Kohl to National Grocery Company an asset of the Company, collectible whenever the Company elected to collect it.

Re-cross-examination:

I base my answer on Mr. Kohl's general standing and responsibility. I have no statement before me of his assets, but I know he owns real estate at Rumson, Monmouth County, New Jersey, where he has quite an estate. That is just one item I know. We have always considered in the bank that Mr. Kohl was good for any of his obligations.

Frank C. Ferguson, a witness on behalf of the petitioner, being duly sworn, testified that he resides in East Orange, New Jersey; is President of the Hudson County National Bank, and Chairman of the Port of New York Authority of the Port of New York; has been President of the Hudson County National Bank for twenty years, and Chairman of the Port Authority for twelve years.

I have examined the statements of the National Grocery Company as to the number of stores operated, sales, balance sheets, statement of profits, and other exhibits in the case.

In my opinion for the year ending January 31, 1931, the surplus of the corporation was not in excess of the reasonable needs of the business. In

my opinion it was good sound business practice for the Company in that year not to declare any dividends, because in view of the times it was important to conserve all cash resources.

I am familiar with the inventory of securities owned by the National Grocery Company in the year ending January 31, 1931. For the purposes of the business you would have to eliminate entirely from the statement of the National Grocery Company all the shares of stock in Jersey City and Hoboken banks, because they had no liquidity. When asked what effect the depression had on the salability of local bank stocks, Mr. Ferguson testified:

> "For a time we tried to peg the market and found it impossible. Had to let the market go. I could not sell the bank stocks of these banks with the possible exception of the Commercial Trust Company, which always maintained somewhat of a market. But the rest of the stocks, including my own bank's stocks, were absolutely unsalable at any time in this period. . . .
>
> As I have already stated, those securities could not have been sold nor could they have been used as collateral securities for a loan. As a matter of fact, they could not be used as collateral securities for a loan today in any bank that I know of."

Cross-examination:

None of the local bank stocks could have been sold on January 31, 1931. The market for bank stocks entirely disappeared in the latter part of October and November and December, 1930. They could not have been sold. They had no market

value at that time. Stocks listed in these schedules, in the quantities listed in these schedules had no market value on January 31, 1931. By that I do not mean to say that a few shares of each of these bank stocks could not have been sold in the market at that time, but you are asking me about the quantities of stocks contained in this portfolio. I cannot think of any bank stocks in Jersey that had any market value on January 31, 1931. The stock in my own bank that was owned by the National Grocery Company at that time had no market value. I am talking about this portfolio. I am just as frank about the stock in my own bank as I am about the stock in any other. We tried for a while to peg the market and we got licked. I don't know how long it was. We made the discovery very shortly after we tried to peg it. That was very shortly after the big break in the market.

The National Grocery Company could have declared a dividend in 1930, and it would not have impaired the business of the National Grocery Company. As far as I know it might have declared a dividend in 1929. I am reasonably familiar with the business of the National Grocery Company, but not anywhere near as familiar with it as Mr. Field. I am well acquainted with Mr. Kohl and know his financial reputation and standing. The Company might have declared a dividend in 1928, and not impaired the business.

Fred J. Armbruster, a witness on behalf of the petitioner, being duly sworn, testified that he resides in Montclair, New Jersey. His business is stocks and bonds and he is with the firm of Outwater & Wells, Jersey City, specializing in municipal bonds, public utilities, bank stocks, and insurance stocks.

Statement of Evidence and Exhibits 1-24 Inclusive and "A".

I appraised at counsel's request the bank and insurance company stocks owned by the National Grocery Company as of January 31, 1930, and January 31, 1931. I secured the information as to the price per share or value per share from various sources. Where we were able to arrive at a price according to our own books, actual transactions having transpired, we used that. We also referred to the Financial Chronicle where our records showed nothing. We also referred to our own quotation sheet that came out at that time which would give us a line as to what was in the market; that gave a pretty good idea of how things were offered and what bids were being made.

The figures on Commercial Trust Company were taken entirely from our own records of actual transactions that we had; also First National Bank of Jersey City, and Hudson County National Bank. The First National Bank of Hoboken was the result of the Chronicle and our own quotation sheet, we having had no actual transactions in that.

The last sale prior to January 31, 1931, on the First National Bank of Jersey City was on the 22nd day of December, 1930, for $50. The First National of Hoboken showed absolutely nothing beyond the early part of 1929, and I don't know what those figures were. I have not them here. We stopped trading in First National of Hoboken after the early part of 1929, and showed no more transactions. That Bank merged with the First National Bank of Jersey City about a year ago, with serious loss to the stockholders.

The fair market value of the stock of the Hudson County National Bank as of January 31, 1931,

was $83 a share; First National Bank of Jersey City $50 a share; Commercial Trust Company $132 a share; New Jersey Title Guarantee & Trust Company $95 a share.

In my opinion it would not have been possible in January, 1931, to have liquidated the National Grocery Company's inventory of bank stocks. We were having difficulty in trying to trade in lots of 15 and 20 and maybe 25 shares, and occasionally a 50 share lot. Our records show that the trades, what few there were, were in small lots. These prices are the prices of small lots of bank stocks of those particular banks. You could have traded in those bank stocks about 1933 or 1934, in a little bit larger quantities, and it all depended upon conditions. There may be a rumor prevalent that something might transpire in a certain bank which might arouse a flurry for a short period of time.

Cross-examination:

The local bank stocks could not have been liquidated on January 31, 1931. Even in our best bank stocks, big blocks like that, if put on the market, would have raised havoc. I am basing my answer on the basis of the blocks represented in this portfolio. I am giving my testimony on the lack of marketability if they were all placed on the market at one time. The bank stocks could not have been liquidated in January, 1930, because we had declared a condition which started around the middle of December, 1929, and ended about April of 1930, where you could not trade in any of the stocks of the five large Jersey City banks. After April, 1930, you might have done it in small lots. My figures show 15 and 20 and 30

shares. The period in between was due to an embargo on bank stocks. There was an agreement made between the banks, on bank stocks, and the brokers to maintain values in order not to impair collateral loans. Everybody knew about it. Everybody knew they could not trade in local bank stocks at that time. There was no market. I do not know whether the New York Times and the Chronicle and the like had knowledge of this agreement. I do not know whether or not it would have been to our advantage to have published the agreement. This was not an act of the brokers. We were requested by the banks to do that and we did it. We were acting in cooperation with the Banks, in order not to impair collateral loans, but they did not realize what would happen. We did not impair collateral loans for that period of time, so far as trading in those five Jersey City bank stocks were concerned. That only applies to five banks.

The inventory might have been liquidated piecemeal on January 31, 1929. You could not sell blocks like that if thrown on the market at any time. There was trading in the stocks in January, 1929. I do not know whether the stocks in this portfolio were in such large quantities that the market might not have gradually absorbed them. An awful lot of stock is represented and if that was the only stock on the market, I would say it could have been gradually absorbed because there was a lot of speculation at that time.

On January 31, 1929, there might have been considerable difficulty in liquidating the 5850 shares of stock of the Commercial Trust Company because of the amount of stock involved with a value of one million and eighty-two odd thousand dollars. That amount could not have been

liquidated over a period of three or four months. I get the values on the Commercial Trust Company stock from our own trades that we made during that time—actual sales.

Percy A. Gaddis, a witness on behalf of the petitioner, being duly sworn, testified that he resides at Red Bank, New Jersey, and is an appraiser and consultant in real estate matters at 900 Bergen Avenue, Jersey City. He has been in the real estate business in Jersey City continuously since 1893, and qualified as an expert in real estate values.

He testified that he had made an examination of the real estate holdings of the National Grocery Company in Jersey City, including the office and warehouse buildings, the old warehouse, bakery and garages, and had made a map and an inventory and appraisal.

He testified that in his opinion the fair market value of the buildings, machinery and equipment, shown on the balance sheet as permanent assets, had declined in value during the year ending January 31, 1931, because of the general market conditions, by $125,000.

The foregoing Statement of Evidence sets forth all of the material evidence adduced at the hearing of this cause bearing upon the issues raised in the Petition for Review, and, in order that the same may be preserved and made a part of this record, said Statement of Evidence is duly approved, settled, and ordered filed this 23rd day of January, 1937.

CHARLES P. SMITH
Member, United States Board of Tax Appeals.

Statement of Evidence and Exhibits 1-24 Inclusive and "A".

Agreement as to Record.

IT IS HEREBY STIPULATED by the attorneys for the petitioner and the respondent, as follows:

(1) The foregoing statement is agreed upon as a correct statement of the opening of the case before the Board Member, and a correct narrative statement of the testimony before the Board.

(2) The only portion of Exhibit 3 for petitioner, being the Certificate of Incorporation of National Grocery Company, that need be printed is that annexed hereto.

(3) Copies of the income tax returns filed by Henry Kohl for the years 1922 to 1930, inclusive, marked Exhibits C to K, inclusive, and the tax return of the National Grocery Company for the fiscal year ended January 31, 1931, marked respondent's Exhibit B, need not be printed in the record. Three photostatic copies of each return shall be sent to the Clerk of the United States Circuit Court of Appeals for the use of the Judges, and shall be submitted with the record for the consideration of the Court.

(4) The foregoing narrative statement, together with the annexed copy of Exhibit 3, and all other exhibits in the cause, shall constitute the Statement of Evidence on the appeal in the within matter, and be printed as the record, except as noted in paragraph 3 hereof.

Dated: January 8th, 1937.

JAMES D. CARPENTER, JR.,
Attorney for Petitioner.

MORRISON SHAFROTH,
Attorney for Respondent.

Exhibit 1.

Exhibit A.

Office of
Commissioner of Internal Revenue
Treasury Department
Washington

IT:CA:2112-3-60D Apr. 11, 1927.
National Grocery Company,
480 Montgomery Street,
Jersey City, New Jersey.

Sirs:

The determination of your income tax liability for the years ended January 31, 1923 and January 31, 1924, pursuant to an examination of your books of account and records, disclosed a deficiency in tax amounting to $349,993.54, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final deci-

sion on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA:2112-3-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.

By C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement
Form A
Form 882

Exhibit 1.

STATEMENT

IT:CA:2112-3-60D

In re: National Grocery Company,
480 Montgomery Street,
Jersey City, New Jersey.

Fiscal Years Ended	Deficiency in Tax
January 31, 1923	$165,322.60
January 31, 1924	184,670.94
Total	$349,993.54

January 31, 1923

Net income reported		$549,340.20
Additions:		
1. Excessive depreciation	$ 9,146.50	
2. Furniture and fixtures	20,319.39	
3. Insurance reserve income	45,167.58	
Total additions		74,633.47
Net income as adjusted		$623,973.67

Explanation of Adjustments to Net Income

1. Depreciation allowed under provisions of Article 161, Regulations 62.

Amount of depreciation allowed	$48,214.39
Amount of depreciation taken	57,360.89
Amount disallowed	$ 9,146.50

2. Furniture and fixtures, included in expense account which should be capitalized, Article 581, Regulations 62.

3. Self-insurance charges, not covered by damages or reflected in net credit for year to insurance reserve indicate profit not reported.

Exhibit 1.

STATEMENT

National Grocery Company
Computation of Tax

Net income	$623,973.67
Amount of tax under Section 220—25%	$155,993.42
Amount of tax at 12½%	77,996.71
Total	$233,990.13
Original tax	68,667.53
Additional tax	$165,322.60

January 31, 1924

Net income reported		$556,704.21
Additions:		
1. Excessive depreciation	$ 4,633.11	
2. Furniture and fixtures	16,005.99	
3. Insurance reserve increase	60,268.19	
Total additions		80,907.29
Net income as adjusted		$637,611.50

Explanation of Adjustments to Net Income

1. Same as #1 for 1923.

Depreciation allowed	$58,728.50
Depreciation claimed	63,361.61
Depreciation disallowed	$ 4,633.11

2. See #2 explanation to net income 1923.

3. See #3 explanation to net income 1923.

Exhibit 1.

Computation of Tax

Net Income		$637,611.50
Tax under Section 220—1921 law—@ 25% —$159,402.88 for 11 months		$146,119.31

STATEMENT

National Grocery Company

	Forward	$146,119.31
Tax under Section 220—1924 law @ 50%		
Taxable income	$637,611.50	
Add:		
United States Obligations	26,210.89	
Dividends	18,694.80	
Total income	$682,517.19	
	341,258.60 for 1 month	28,438.22
Total tax under Section 220		$174,557.53
Amount of tax at 12½%		79,701.44
Total		$254,258.97
Original tax		69,588.03
Deficiency in tax		$184,670.94

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Due to the fact that the statute of limitation will presently bar any assessment of additional tax against you for the fiscal year ended January 31, 1923, the Bureau will be unable to afford you an opportunity to discuss

Exhibit 1.

your case before mailing formal notice of its determination as provided by Section 279(a) of the Revenue Act of 1926. It is necessary at this time, in order to protect the interests of the Government, to issue a formal notice of deficiency.

Exhibit B.

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
and Refer to
IT:E:RR
GES

May 2, 1928

National Grocery Company,
480 Montgomery Street,
Jersey City, New Jersey.

Sirs:

Reference is made to your protest against the decision contained in office letters of April 14, 1927 and May 31, 1927 with respect to the tax liability of your Company for the fiscal years ended January 31, 1923 and January 31, 1924 under the provisions of Section 220 of the Revenue Acts of 1921 and 1924.

You are advised that after careful consideration of all the facts and figures set forth in your

protest, at hearings held with your representative, Mr. J. M. Enright, and data subsequently submitted, it has been determined that the evidence in the case does not show an unreasonable accumulation of gains and profits for either of the two years mentioned.

In view thereof your protest has been sustained and it is held that your Company is not subject to taxation under the provisions of Section 220 of the Revenue Acts of 1921 and 1924 for the fiscal years ended January 31, 1923 and January 31, 1924.

A copy of the General Counsel's recommendation in the case which has been approved by this office is enclosed for your information.

Respectfully,

D. H. BLAIR
Commissioner

Enclosure:
Copy of Recommendation.

GC:1:1
A-222130

In re: National Grocery Company,
Jersey City, N. J.

April 14, 1928

MR. COMMISSIONER:

This office has given careful consideration to the protest of the National Grocery Company, 480 Montgomery Street, Jersey City, New Jersey,

against the application of the provisions of Section 220 of the Revenue Acts of 1921 and 1924 for the fiscal years ended January 31, 1923, and January 31, 1924.

Hearings in the case were held in this office on July 19 and October 29, 1927, at which the taxpayer was represented by Mr. J. M. Enright, 75 Montgomery Street, Jersey City, New Jersey. From the evidence previously on file, adduced at the hearings and submitted subsequent thereto the following facts appear:

The taxpayer is engaged in the business of operating a chain store system of retail grocery stores employing the "cash and carry" plan. The corporation was organized under the laws of the State of New Jersey in 1908, with an authorized capitalization of $5,000.00, which was increased in 1911 to $200,000.00. All of its capital stock, except qualifying shares, was held by Mr. Henry Kohl, President of the Company, during the period under review. From a business consisting in 1908 of three retail grocery stores with gross sales of $181,028.79, the taxpayer has increased its operations so that at the end of January, 1927, it was operating 625 stores with gross sales of $19,239,740.66. The net profits (as adjusted) for 1923 were $589,278.25 and for 1924, $620,496.86, no part of which was distributed as dividends but all added to surplus, which at the close of the fiscal year ended January 31, 1924, amounted to $3,550,979.07.

A schedule submitted by the taxpayer of the stores operated, the gross sales, and the net profits for the period 1908 to 1927, is as follows:

Exhibit 1.

Year	Number of Stores Operated	Increase over Preceding Year	Gross Sales	Net Profits Per Books	Net Profits as Adjusted
1908	3		$ 181,028.79	$ 4,584.39	$ 4,584.39
1909	11	8	267,414.46	7,144.23	7,144.23
1910	24	13	601,350.44	40,806.96	40,806.96
1911	38	14	975,532.76	58,601.38	58,601.38
1912	55	17	1,387,924.15	74,931.22	74,931.22
1913	81	26	1,899,323.66	66,989.90	66,989.90
1914	104	23	2,603,213.96	101,954.66	101,954.66
1915	132	28	3,446,218.84	173,180.81	182,842.58
1916	169	37	3,924,470.57	124,451.65	153,728.16
1917	217	48	5,494,394.70	235,885.21	296,567.73
1918	268	51	8,749,196.50	584,841.59	677,735.20
1919	290	22	10,623,466.32	274,249.13	525,227.94
1920	311	21	12,602,935.14	323,934.24	584,533.65
1921	344	33	15,036,341.52	119,156.70	341,238.70
1922	359	15	13,542,171.36	357,445.30	422,045.98
1923	389	30	13,721,399.46	498,800.46	549,340.20
1924	449	60	15,378,387.45	582,407.28	556,704.21
1925	483	34	15,973,716.30	581,745.32	543,485.49
1926	537	54	17,321,525.50	576,592.13	517,791.38
1927	625	88	19,239,740.66	565,507.90	493,387.26

During the year 1911 the profits were at the rate of $1,362 for each store, and during 1926 the average profits for each store were $789.00. Since 1915 the business of the Company has been developed in line with the policy of ultimately operating a chain system of 1,000 stores, and the financial management, plant development and general policies have been based upon such ultimate operation, although a more recent policy has contemplated a chain system of 2,000 stores.

The comparative balance sheets for the period February 1, 1922 to January 31, 1924, reflect the following items:

Exhibit 1.

Assets	February 1, 1922	January 31, 1923	January 31, 1924
Cash	$ 556,262.39	$ 360,939.09	$ 506,629.97
Accounts Receivable	90,663.17	14,524.71	5,898.73
Notes Receivable	100,000.00	0	24,465.28
Sundry Claims, Loans and other Receivables	28,169.81	59,448.47	100,593.27
Inventories	1,372,140.87	2,184,282.30	1,890,315.11
Deferred Charges	11,819.80	9,679.94	20,718.55
Investments:			
U. S. and Mun. Bonds	490,000.00	510,294.57	751,469.58
Capital Stocks of Com. Corporations	128,210.00	264,421.25	347,331.25
Bonds (Other Corp.)	2,500.00	37,729.16	263,272.74
Capital Assets:			
Land	30,500.00	30,500.00	69,348.50
Buildings	408,665.86	408,665.86	413,427.66
Utensils	18,373.58	11,092.17	4,406.85
Machinery	38,474.08	38,474.08	41,504.05
Fixtures and Rolling Stocks	97,857.81	114,867.81	205,884.93
Capital Expenditures Restored in Audit of Prior Years	49,075.14	69,394.53	85,400.52
	$3,422,712.51	$4,114,313.94	$4,730,666.99
Liabilities and Capital			
Notes Payable	$ 20,250.00	$ 14,750.00	$ 14,750.00
Accounts Payable	167,235.81	240,806.42	180,811.26
Accrued Liabilities	8,588.27	5,849.06	9,657.23
Reserve for Depreciation	207,070.75	244,062.43	296,105.81
Capital Stock	200,000.00	200,000.00	200,000.00
Surplus	2,521,957.52	2,991,670.90	3,550,979.07
Surplus Reserves:			
Res. for Fed. Tax	79,270.14	68,667.53	69,588.03
Res. for Contingencies	140,000.00	225,000.00	225,000.00
Res. for Insurance	78,340.02	123,567.60	183,775.79
	$3,422,712.51	$4,114,313.94	$4,730,666.99

The distribution of profits for 1923 and 1924 is shown by the following schedule:

Year	1923	1924
Reinvested in the Business	$397,543.37	$ 70,868.27
Invested in securities considered by the Unit as not needed in the business	191,734.88	549,628.59

Exhibit 1.

The taxpayer contends that its earnings for the fiscal years 1923 and 1924 were not distributed for the reason that the funds were needed for use in its business and were retained in accordance with a definite financial plan involving the application of its surplus to the following commitments:

1. The building program.
2. Increase in number of stores operated.
3. Additional Internal Revenue Tax proposed.
4. Insurance Reserve.
5. Necessity of maintaining large deposits in local banks.
6. Having a portion of its surplus invested in liquid securities so as to facilitate borrowing.

1. *Building Program.*

In 1916 negotiations were begun for acquiring property upon which to erect a warehouse and office building. In 1917 property was purchased which was later found to be unsuited for the purpose. Other property was sought and on June 15, 1923 such property was acquired, whereupon an architect was commissioned to prepare plans for erecting a ten-story building. The plans for this building, including equipment, called for an expenditure of approximately two million dollars. Later it was found necessary to curtail this project and a six-story building was erected on the property at an expenditure of $1,188,586.11. In 1921 plans had been prepared for the erection during 1923 and 1924 of an additional story on one of the Company's warehouse buildings at an estimated cost of $200,000.00. It was found expedient later to abandon this undertaking entirely.

Exhibit 1.

2. *Increase in Stores.*

Prior to the beginning of the fiscal year ended in 1923 the taxpayer was committed to a project involving a large increase in the number of stores operated, at an estimated outlay of capital for each store in the amount of $5,000. Thirty stores were added during 1923, sixty in 1924, thirty-four in 1925, fifty-four in 1926, and eighty-eight in 1927.

3. *Additional Tax in 1924.*

The taxpayer was notified in 1923 that it appeared to be subject to additional income tax for the years 1915 to 1920, approximating $400,000.00. At the end of 1926 there was actually paid for the period 1915 to 1922 additional tax in the amount of $131,066.55.

4. *Insurance Reserve.*

The taxpayer considered that inasmuch as its risks were scattered among so many units, it might profitably refrain from insuring with outside underwriters and set up its own reserve for carrying its risks. It began the building up of its own insurance reserve from contributions determined upon the basis of standard premium rates. The additions to this reserve fund during 1923 and 1924 amounted to $45,167.58 and $60,268.19 respectively.

5. *Bank Deposits.*

By reason of the wide area covered by the taxpayer's stores, it is necessary to make frequent cash collections from the various stores and deposit them in the nearest local banks from which local banks the funds are withdrawn by check to

a bank of central deposit. This local banking service is an accommodation to the Company and without profit to the local bank unless a substantial average deposit is carried. For this reason the deposit carried by the Company in local banks, although large in the aggregate, is not available for use. The Company from time to time is likely to have immediate use for large sums of money in excess of its bank balances and at such times is temporarily accommodated by overdrafts or short-term bank loans until collections have made up the deficit. Under the terms of this banking accommodation it is necessary that the Company maintain at all times large cash balances.

6. *Surplus Invested in Securities.*

By reason of a large surplus which the taxpayer has invested in substantial securities, it is able at all times to borrow large sums of money and it has been found to be more profitable to borrow from banks on the strength of this surplus than to sell its securities and repurchase them later. The needs of the business have involved considerable borrowing of funds and during the year 1924 outstanding loans reached $400,000.00, during 1925, $300,000.00, and in 1926 the peak was at $800,000.00.

It is the general contention of the taxpayer that its surplus was built up with the definite object of the expansion of its business and the increase of its physical plant assets. The present capital and surplus are still deemed inadequate for the operation of 1,000 stores, which was the minimum of the program originally adopted.

A careful study of the evidence on file leads to the conclusion that the earnings of the taxpayer were being accumulated solely for use in its business and in accordance with the reasonable needs

of that business as determined by a definite financial program adopted early in its history. Accordingly it would appear that the corporation was not availed of during the period under review for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains and profits to accumulate beyond the reasonable needs of its business.

For the reasons above this office is of the opinion that the taxpayer has not incurred liability under section 220 of the Revenue Acts of 1921 and 1924 for the fiscal years ended in 1923 and 1924 and its protest to that effect should be sustained.

The administrative file of the Income Tax Unit is forwarded herewith.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Approved:

(Signed) D. H. BLAIR,
Commissioner of Internal Revenue.

Encl.: Adm. File.
Ft.-4.

Exhibit 1.

Exhibit C.

STATEMENT.

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Washington

Office of
The General Counsel

Address Reply to The General Counsel
Bureau of Internal Revenue
and Refer to
GC:A

May 28, 1929.

John M. Enright, Esq.,
75 Montgomery Street,
Jersey City, New Jersey.

In re: Appeal of National Grocery Company,
Docket #29022.

Sir:

There are enclosed three copies of a proposed stipulation in connection with the above-entitled appeal now pending before the United States Board of Tax Appeals, giving effect to the elimination of the application of Section 220.

If you are in agreement with the proposed stipulation you are requested to sign the original and one carbon and return same to this office in order that the stipulation may then be filed with the Board and the appeal thus disposed of.

Exhibit 1.

For your convenience there is enclosed a copy of the computation of the proposed tax liability as revised.

Respectfully,

C. M. CHAREST,
General Counsel.

Enclosures:
3 copies of stipulation.
copy of computation of tax liability.

UNITED STATES BOARD OF TAX APPEALS.

NATIONAL GROCERY COMPANY, Petitioner, *vs.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	DOCKET No. 21022.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel, that in the above-entitled appeal there are deficiencies in tax for the fiscal years ended January 31, 1923 and January 31, 1924 in the respective amounts of $9,329.18 and $10,113.41, and that the Board may enter an order of redetermination accordingly.

Exhibit 1.

It is understood and agreed that the Commissioner may assess and collect the said deficiencies immediately upon the issuance by the Board of its order of redetermination without regard to the restrictions, if any, contained in Section 274(a) of the Revenue Act of 1926 or Section 272(a) of the Revenue Act of 1928.

JOHN M. ENRIGHT,
McDERMOTT, ENRIGHT & CARPENTER,
Attorney for Petitioner.

.....
Attorney for Respondent.

HDT/fac.

STATEMENT.

SA:BJS
JEM:JJP

In re: National Grocery Company,
Jersey City, New Jersey.

Docket: #29022

Fiscal Year Ended:	Deficiency in Tax
January 31, 1923	$ 9,329.18
January 31, 1924	10,113.41
Total	$19,442.59

5

Exhibit 1.

NATIONAL GROCERY COMPANY

FISCAL YEAR ENDED JANUARY 31, 1923

Schedule 1

Net income as disclosed by Bureau letter dated April 11, 1927	$623,973.67
As corrected	623,973.67
Net adjustment	None

Schedule 2

Computation of Tax (Section 230)

Net Income—Schedule 1	$623,973.67	
Less:		
Exemption	None	
Taxable at 12½%	$623,973.67	
Tax at 12½%		$ 77,996.71
Tax assessed		68,667.53
Deficiency in tax		$ 9,329.18

Exhibit 1.

FISCAL YEAR ENDED JANUARY 31, 1924

Schedule 3

Net Income

Net income as disclosed by Bureau letter dated April 11, 1927		$637,611.50
As corrected		637,611.50
Net adjustment		None

Schedule 4

Computation of Tax (Section 230)

Net income—Schedule 3	$637,611.50	
Less:		
Exemption	None	
Taxable at 12½%	$637,611.50	
Tax at 12½%		$ 79,701.44
Tax assessed		69,588.03
Deficiency in tax		$ 10,113.41

Exhibit 1.

Exhibit D.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

NATIONAL GROCERY COMPANY, Petitioner, *vs.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	DOCKET No. 29022

DECISION

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Board on June 4, 1929, it is

ORDERED and DECIDED: That there are deficiencies for the fiscal years ended January 31, 1923 and January 31, 1924 in the amounts of $9,329.18 and $10,113.41, respectively.

(Signed BENJAMIN H. LITTLETON
Member,
United States Board of Tax Appeals

ENTERED
JUN 12 1929

Exhibit 2.

Exhibit E.

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal
Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to
IT:E:RR
GES

February 1, 1930.

National Grocery Company,
300 Mercer Street,
Jersey City, New Jersey.

Sirs:

From an examination of the Federal income tax return filed by your corporation for the fiscal year ended January 31, 1928, it would appear that your corporation may have incurred liability under Section 220 of the Revenue Act of 1926 and Section 104 of the Revenue Act of 1928.

The provisions of Section 220 of the Revenue Act of 1926 are as follows:

"(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50

per centum of the amount thereof, which shall be in addition to the tax imposed by section 230 of this title and shall (except as provided in subdivision (d) of this section) be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

"(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax.

"(c) When requested by the Commissioner, or any collector, every corporation shall forward to him a correct statement of such gains and profits and the names and addresses of the individuals or shareholders who would be entitled to the same if divided or distributed, and of the amounts that would be payable to each.

"(d) As used in this section the term 'net income' means the net income as defined in section 232, increased by the sum of the amount of the deduction allowed under paragraph (6) of subdivision (a) of section 234, and the amount of the interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner.

"(e) The tax imposed by subdivision (a) of this section shall not apply in respect of any taxable year if all the shareholders of the corporation include (at the time of filing their

returns) in their gross income their entire distributive share, whether distributed or not, of the net income of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of the earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included."

The provisions of Section 104 of the Revenue Act of 1928 are as follows:

"(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

"(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax.

Exhibit 2.

"(c) As used in this section the term 'net income' means the net income as defined in section 21, increased by the sum of the amount of the dividend deduction allowed under section 23 (p) and the amount of the interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner.

"(d) The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their return) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of the earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included."

You will note from a review of the provisions of the statutes quoted above, the fact that your corporation has permitted its gains or profits to accumulate beyond the reasonable needs of its business is considered prima facie evidence of a purpose to prevent the imposition of the surtax upon its stockholders.

Before determining whether the provisions of Section 220 of the Revenue Act of 1926 and Section 104 of the Revenue Act of 1928 are applicable to your corporation for the fiscal year ended Jan-

uary 31, 1928, it is desired to extend to you full opportunity to be heard and to present by way of protest evidence to overcome the prima facie case created under the terms of the statutes.

In accordance with the foregoing, the matter will be held in abeyance for thirty days from the date of this letter within which time you may, if you desire, present a protest and show cause why the additional amount of taxes due under the provisions of the statutes quoted above should not be paid. If you desire a hearing on the matter, a request for such hearing should accompany your protest, and a hearing will be granted after the protest has been reviewed.

The statutory period of limitations applicable to the return filed for the fiscal year ended January 31, 1928, will expire on May 15, 1930. In view thereof, if you desire to file a protest and appear in a hearing upon the matter of applying the provisions of Sections 220 and 104, it is requested that the original and duplicate copies of the enclosed form of consent extending the period of limitations within which additional taxes may be assessed for that year until December 31, 1930, be immediately executed and forwarded to this office.

If no protest is filed within the period indicated, the audit of the case will be completed, and liability under Sections 220 and 104 of the Revenue Acts applicable to the period involved determined, and notice of the deficiency will issue as provided in Section 272 of the Revenue Act of 1928.

Respectfully,

DAVID BURNET,
Deputy Commissioner.

Enclosure:
Form of Consent.

Exhibit 2.

Exhibit F.

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
and refer to
IT:E:RR
FMH

October 13, 1930.

National Grocery Company,
c/o McDermott, Enright and Carpenter,
75 Montgomery Street,
Jersey City, New Jersey.
Attention: Mr. John M. Enright.

Sirs:

Reference is made to your protest in the matter of the possible liability of your corporation for the fiscal year ended January 31, 1928, under the provisions of sections 220 and 104 of the Revenue Acts of 1926 and 1928, as indicated in office letter dated February 1, 1930.

You are informed that after carefully considering the facts contained in your protest and the additional facts disclosed at the hearing afforded your representatives on April 25, 1930, before the office of the General Counsel of the Bureau, the protest is sustained.

Accordingly, it is held that your company is not subject to taxation for the fiscal year ended January 31, 1928, under sections 220 and 104 of the Revenue Acts of 1926 and 1928.

Respectfully,

J. C. WILMER,
Deputy Commissioner.

Exhibit 3.

CERTIFICATE OF INCORPORATION

OF

NATIONAL GROCERY COMPANY

This is to certify, that the undersigned do hereby associate themselves into a corporation, under and by virtue of the provisions of an act of the legislature of the State of New Jersey, entitled "An act concerning corporations (Revision of 1896)," and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite their respective names.

FIRST: The name of the corporation is the National Grocery Company.

Second. The location of the principal office in this state is at No. 450 Spring Street, West Hoboken, County of Hudson, N. J.

The name of the statutory agent therein and in charge thereof, and upon whom process against this corporation may be served, is Kenry Kleen.

Third. The objects for which this corporation is formed are to buy, sell and deal in groceries and vegetables of all kinds and conduct in all its branches the business of grocery men.

Fourth. The total authorized capital stock of this corporation is Five Thousand (5,000) Dollars, divided into fifty (50) shares of the par value of one hundred (100) dollars each.

Fifth. The names and post-offices of the incorporators and the number of shares subscribed for by each, the aggregate of such subscription being

the amount of capital stock with which the Company will commence business, are as follows:

Name	Post-Office Address	Number of Shares
Benjamin, Treacy,	15 Exchange Place, J. C.	4
Frank G. Smith,	548 Jersey Ave., J. C.	3
John J. Treacy,	657 Jersey Ave., J. C.	3

Sixth. The directors shall have power to make, alter and amend the by-laws of the Company.

In Witness Whereof, we have hereunto set our hands and seals the second day of June, A. D., 1908.

Benjamin Treacy
Frank G. Smith
John J. Treacy

Signed, Sealed and Delivered in the presence of I. F. Goldenhorn

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Certificate of Amendment of Charter.

National Grocery Company, a corporation of the State of New Jersey, by its President and Secretary, does hereby certify:—

I. That the principal office of the Company is at No. 320 First Street, Jersey City, New Jersey, and that the agent therein in charge thereof and upon whom process against the corporation may be served is Henry Kohl.

II. That the Board of Directors of said corporation at a meeting duly convened and held on the 28th day of August, 1911, passed a resolution declaring that the capital stock of said corpora-

tion be increased, and that the changes and amendments in the certificate of incorporation hereinafter set forth be advisable, and calling a meeting of the stockholders to take action thereon.

III. That a copy of said resolution of the board of directors is hereto appended.

IV. That thereafter on the 28th day of August, 1911, pursuant to such call of the board of directors, and upon waiver of notice of the time, place and purpose of such meeting, signed by all the stockholders, a special meeting of the stockholders of the company was held, at which meeting all the stockholders having voting powers were present in person, and that all the stockholders having voting powers voted in favor of such increase of capital and of such changes and amendments; such changes and amendments being as follows:

The amendment of the third article of said certificate of incorporation to read as follows:

"III. The objects for which this corporation is formed are to buy, manufacture, sell and deal in groceries, vegetables, meats, provisions, food products and kindred commodities, and conduct such business as wholesale or retail dealers in all branches."

The amendment of the fourth article of said certificate of incorporation to read as follows:

"IV. The corporation shall be authorized to issue capital stock to the extent of two hundred thousand dollars, divided into two thousand shares, of the par value of one hundred dollars each."

Exhibit 3.

The amendment of the sixth article of said certificate of incorporation to read as follows:

"VI. The board of directors shall have "power without the assent or vote of the "stockholders to make, alter, amend and "rescind the by-laws of this corporation, to "fix the amount to be reserved as working "capital, to authorize and cause to be exe- "cuted mortgages and liens without limit as "to amount upon the real and personal prop- "erty of this corporation.

"With the consent in writing and pursuant "to the vote of the holders of a majority of "the stock issued and outstanding, the direc- "tors shall have power and authority to sell, "assign, transfer or otherwise dispose of the "property of this corporation as an entirety.

"The directors may from time to time de- "termine whether and to what extent, and at "what times and places and under what con- "ditions and regulations, the accounts and "books of the corporation, or any of them, "shall be open to the inspection of the stock- "holders; but every stockholder shall have "the right of inspecting the stock and trans- "fer books of the corporation at all times "during business hours at the registered "office of the Company in New Jersey.

"The directors shall have power to hold "their meetings, to have one or more offices, "and to keep the books of the corporation "(except the stock and transfer books) out- "side of the State of New Jersey, at such "places as may be from time to time desig- "nated by them."

Exhibit 3.

The addition of article Seventh to said certificate of incorporation: Said article to read as follows:

"The following clauses shall be construed "both as objects and powers:

"(A) To manufacture, purchase, or other- "wise acquire goods, wares, merchandise and "personal property of every class and de- "scription, and to hold, own, mortgage, sell "or otherwise dispose of, trade, deal in and "deal with the same.

"(B) To acquire and undertake the good "will, property, rights, franchises and assets "of every kind and the liabilities of any per- "son, firm, association or corporation, either "wholly or partly, and to pay for the same in "cash, stock of the corporation, bonds, or "otherwise.

"(C) To enter into, make, perform and "carry out contracts of every kind and for "any lawful purpose with any person, firm, "association or corporation.

"(D) To borrow or raise money without "limit as to amount by the issue of or upon "debentures or debenture stock, or in such "other manner as the corporation shall think "fit.

"(E) To draw, make, accept, endorse, dis- "count, execute and issue promissory notes, "bills of exchange, warrants, bonds, deben- "tures and other negotiable or transferable "instruments.

"(F) To apply for, register, purchase or "otherwise acquire, and to hold, own, use and

"operate, and to sell, assign, grant licenses "in respect of, or otherwise dispose of and "deal with and turn to account any and all "inventions, improvements, formulae, proc- "esses, tradenames and trademarks, copy- "rights, letters patent of the United States "and of any or all foreign countries, and "patent rights of all kinds.

"(G) To conduct business in any of the "states, territories, colonies or dependencies "of the United States, in the District of "Columbia, and in any and all foreign coun- "tries, to have one or more offices therein, to "hold, purchase, mortgage and convey real "and personal property, without limit as to "amount, in any such state, territory, colony, "dependency, district or foreign country, but "always subject to the laws thereof.

"(H) To remunerate any person or corpo- "ration for services rendered, or to be ren- "dered, in placing or assisting to place or "guaranteeing the placing of any of the "shares of stock of the corporation, or any "debentures or other securities of the corpo- "ration, or in or about the formation or pro- "motion of the corporation or in the conduct "of its business.

"(I) To do any or all of the things herein "set forth to the same extent as natural per- "sons might or could do, and in any part of "the work.

"(J) In general, to carry on any other "business in connection with the foregoing, "whether manufacturing or otherwise, and "to have and to exercise all the powers con-

Exhibit 3.

"ferred by the laws of New Jersey upon cor-
"porations formed under the act hereinafter
"referred to: It being

"hereby expressly provided that the fore-
"going enumeration of specific powers shall
"not be held to limit or restrict in any man-
"ner the powers of the corporation."

IV. That at said meeting of the stockholders the foregoing increase of capital stock, amendments and changes in the certificate of incorporation were assented to in writing by all the stockholders having voting powers, which said written assent is hereto appended.

V. That twenty shares of stock of said corporation are issued and outstanding.

IN WITNESS WHEREOF the said National Grocery Company has caused this certificate to be signed by its President and its Secretary, and its corporate seal to be hereunto affixed this 28th day of August nineteen hundred and eleven.

NATIONAL GROCERY COMPANY,

By HENRY KOHL,
President

ANNA L. MULLINS,
Secretary

(Corporate Seal)

Exhibit 4.

Statement of Stores, Taxes, Earnings, etc., '08 to '35.

(*Opposite* ☞)

Number Stores	Henry Kohl's Salary	Personal Income Taxes Paid by Mat. Gro. Co.	Net Profits of Books after deducting Henry Kohl's Salary and Federal Income Taxes	Dividends Declared to Henry Kohl	Net Additions to Capital and Surplus	Other Taxes Real Estate, Personal, etc.	Henry Kohl's Personal Income Tax
12/31/1906			$16359 07		$16359 07		
3	$3125 00		4584 39		4584 39		
11	3380 00		7968 68		7968 68		
23	3380 00		40806 96		40806 96		
39	3380 00		58601 38		58601 38		
57	4955 00	$899 31	74931 22		74931 22		
81	5200 00	1932 67	66989 90		66989 90	$1799 43	
104	6450 00	3593 85	101954 66		101954 66	1898 87	
134	10400 00	3647 66	173180 81		173180 81	7956 20	
171	10400 00	2200 66	124451 65		124451 65	6169 54	$64 00
217	15000 00	16621 91	235885 21	$25000 00	210885 21	6090 02	64 00
268	20300 00	270734 95	584841 59		584841 59	6983 95	110 00
290	20800 00	242446 98	274249 13	25000 00	249249 13	11431 86	203 00
310	31200 00	284430 80	323932 24		323932 24	17712 39	1877 44
344	5620 00	133374 32	254156 70		254156 70	23986 18	7755 19
358	50400 00	91526 44	324908 63		324908 63	27721 72	2653 91
388	52000 00	77996 71	461106 88		461106 88	28804 00	7176 02
448	52000 00	79701 44	547483 80		547483 80	31447 00	6419 16
482	54000 00	76248 30	528022 34		528022 34	33999 67	7106 41
535	10000 00	73510 07	508837 06		508837 06	35800 31	5090 87
625	106000 00	74437 56	498879 08		498879 08	34907 47	12689 10
715	104000 00	111828 03	707239 60		707239 60	46411 63	12826 68
782	104000 00	100437 42	769945 96		769945 96	55293 41	12055 85
799	104000 00	93534 11	713181 62		713181 62	57303 14	11636 44
815	104000 00	103316 60	682850 38		682850 38	36371 87	10946 49
	$1026570 00	$1842719 79	$6085348 94	$50000 00	$8035348 94	$472088 66	11140 84
							$109815 40
819	104000 00	28845 43	525947 67	100000 00	425947 67	56786 87	
815	89500 00	11249 15	132991 35	100000 00	32991 35	61003 04	32034 74
816	84000 00	5842 03	111211 91	100000 00	11211 91	92833 21	60022 48
808	72500 00	53903 37	368685 50	300000 00	68685 50	72995 04	40881 84
792	78000 00	17993 85	202545 99	200000 00	2545 99	60905 28	54916 44
							109443 52
	1424570 00	$1960653 62	$9426731 36	$850000 00	$8576731 36	$816612 10	$407114 42

Recapitulation Total Taxes paid U.S. Govr. $2,367,768.04

" Salaries " Henry Kohl 1,424,570.00

" Dividends " " " 850,000.00

$2,274,570.00

Exhibit 5.

Analysis of Surplus.

(*Opposite* ☞)

National Grocery Co.

Exhibit E
Surplus - Analysis

	1/31/13	1/31/14	1/31/15	1/31/16	1/31/17	1/31/18	1/31/19	1/31/20	1/31/21	1/31/22
Opening Balance	3,251.70	70,241.60	172,196.26	345,377.07	489,050.62	740,765.37	1,400,323.66	1,649,804.65	2,025,305.56	2,241,061.44
Taxable Net Income	66,989.90	101,954.66	173,180.81	143,673.55	276,714.75	659,558.49	374,480.79	325,958.24	400,061.89	488,816.22
Non-taxable "									6,609.00	9,316.00
Income Tax Refund										
Credit Balances of Reserves Returned to Surplus including Liability 1920 Income tax set up as Reserve								100,000.00		
Totals	70,241.60	172,196.26	345,377.07	489,050.62	765,765.37	1,400,323.66	1,674,804.65	2,075,762.89	2,432,175.89	2,739,193.66
Income Taxes Paid									191,625.00	80,000.00
Addl " " "								48,251.35		
Dividends					25,000.00		25,000.00			
Reserve Charges During Year										
Donations									9,470.00	
Tax Reserve Set Up										219,268.14
Closing Balance	70,241.60	172,196.26	345,377.07	489,050.62	740,765.37		1,649,804.65	2,025,305.56	2,241,061.44	2,438,441.66
Totals	70,241.60	172,196.26	345,377.07	489,050.62	765,765.37	1,400,323.66	1,674,804.65	2,075,762.89	2,432,175.89	2,739,193.66

1/31/[illegible]	1/31/25	1/31/26	1/31/27	1/31/28	1/31/29	1/31/30	1/31/31	1/31/32
2,341,031.44	2,406,641.42	2,975,174.86	4,039,345.86	4,682 7.14	5,068,401.44	5,660,953.49	6,425,846.55	7,226,535.51	8,048,330.86	8,909,274.72
485,218.82	622,975.07	697,611.80	608,811.04	5819.04	551,369.35	856,097.80	848,920.05	848,111.80	833,471.87	841,211.91
9,316.00	44,370.21	51,888.80	55,141.82	6188.08	97,666.84	98,769.64	90,668.74	99,587.80	92,060.44	98,444.82
	804.41				41,250.98					
		466,005.84								
2,705,615.68	3,074,009.97	4,089,348.88	4,682,798.17	5,514.26	5,718,708.56	6,545,880.63	7,369,235.34	8,167,972.41	9,003,868.97	9,248,930.84
80,886.06	68,697.85		89,886.06	6188.14	67,868.68	66,607.80	110,808.94	100,196.96	95,825.70	109,888.81
				11750.68	226.45	53,566.80	81,897.89	19,442.59	1,288.86	
	180,167.88									109,000.08
219,288.14										
2,406,641.42	2,975,174.86	4,089,348.88	4,682,201.14	5,0[illegible]401.44	5,660,953.49	6,425,846.55	7,226,535.51	8,048,330.86	8,909,274.72	9,045,105.88
2,705,615.68	3,074,009.97	4,089,348.88	4,682,798.17	5514.26	5,718,708.56	6,545,880.63	7,369,235.34	8,167,972.41	9,003,868.97	9,248,930.84

Exhibit 6.

Balance Sheet 1907–1935.

(*Opposite* ☞)

year ending	1907 2/1/08	1908 2/6/09	1909 2/5/10	1910 2/4/11	1911 2/10/12	1912 2/8/13	1913 2/9/14	1914 2/8/15	1915 2/5/16	1916 2/3/17	1917 2/2/18
ASSETS											
Cash			$ 3,322.63	$ 409.86	$ 6,692.61	$ 22,522.03	$ 14,459.56	$ 60,733.52	$ 71,203.04	$ 103,302.43	$ 89,461.85
Notes Receivable					50.00	50.00	950.00		1,500.00	1,350.00	25,350.00
Accounts Receivable	$ 7,176.56	$ 1,126.89	4,344.04	11,352.68	1,067.29	2,500.24	223.86	2,493.97	10,175.02	14,138.85	12,074.05
Inventories	23,498.13	38,652.31	62,447.52	116,555.87	165,456.44	246,115.08	320,778.62	411,686.87	386,962.06	630,417.84	1,137,595.29
Mortgage											
Bonds											20,000
Stocks	750.00	750.00	750.00	1,150.00	1,250.00	800.00	800.00	800.00	44,700.00	44,700.00	44,700.00
Other											
Deferred			1,113.00	1,633.50			850.00	742.00	776.00		
Permanent	6,991.20	8,204.01	14,527.72	31,673.53	108,579.46	217,435.76	243,009.38	257,377.60	281,385.03	393,438.17	412,260.49
TOTAL	38,415.89	48,733.21	86,504.91	162,777.44	283,095.80	489,423.11	581,071.42	733,833.96	796,701.15	1,187,347.29	1,741,441.68
LIABILITIES											
Notes Payable & Mtge	7,000.00	12,000.00	15,500.00	32,000.00	68,500.00	195,001.00	170,500.00	153,500.00	106,000.00	240,000.00	165,000.00
Accounts Payable	10,472.43	3,956.36	1,285.81	2,456.96	11,344.10	24,180.51	38,375.16	25,836.87	2,862.39	25,030.36	39,790.21
Accrued								115.00			
Reserve Income Tax											
Reserve Insurance										2,250.50	9,120.00
Reserve Deprec. Acct								9,005.02	18,010.04	39,352.50	61,975.95
Reserve for Profit Sharing Coupons											
Reserve for Sales Tax—N. Y. C.											
Reserve for Dividends											
Capital Stock & Surplus	20,943.46	32,776.85	69,719.10	128,320.48	203,251.70	270,241.60	372,196.26	545,377.07	669,828.72	880,713.93	1,465,555.52
RESERVE FOR UNEMPLOY. INS.											
TOTAL	$38,415.89	$48,733.21	$86,504.91	$162,777.44	$283,095.80	$489,423.11	$581,071.42	$733,833.96	$ 796,701.15	$1,187,347.29	$1,741,441.68

NATIONAL GROCERY COMPANY

Balance Sheets from 1907 to 1935

1917 2/2/18	1918 2/1/19	1919 2/1/20	1920 1/31/21	1921 1/31/22	1922 1/31/23	1923 1/31/24	1924 1/31/25	1925 1/31/26	1926 1/31/27	1927 1/31/28	1928 1/31/29
$ 89,461.85	$ 250,515.92	$ 224,313.01	$ 411,961.22	$ 556,264.77	$ 360,422.28	$ 507,409.84	$ 761,107.48	$ 645,982.83	$ 554,601.46	$ 659,734.40	$ 890,397.59
25,350.00				126,000.00			389,100.00	409,100.00	424,100.00	424,100.00	460,000.00
12,074.05	27,216.74	29,532.06	29,610.92	5,405.90	384,991.71	5,188.07	3,711.88	3,057.72	2,901.52	1,888.82	3,975.19
1,137,595.29	1,387,807.01	1,844,475.02	1,726,179.36	1,489,129.24	1,640,084.48	1,869,773.06	2,022,538.53	2,268,013.75	2,572,713.23	2,615,057.67	2,917,716.55
					2,000.00	2,000.00	42,000.00	42,000.00	84,000.00	59,000.00	59,000.00
20,000	47,500.00	80,000.00	80,000.00	490,000.00	476,759.50	1,024,631.53	1,084,186.35	846,960.33	602,572.46	256,114.76	96,820.30
44,700.00	44,700.00	44,700.00	57,850.00	130,710.00	341,176.41	347,331.25	422,025.55	751,076.43	840,621.25	2,169,687.62	2,318,074.13
						114,782.02	17,598.59	55,493.00	9,092.37	6,236.39	7,425.08
						20,738.55	23,796.53	27,457.85	36,150.32	33,338.64	25,685.23
412,260.49	523,913.79	553,917.76	562,206.03	552,387.34	548,338.64	382,173.44	442,022.53	542,448.47	1,391,132.94	1,542,129.60	1,501,193.83
1,741,441.68	2,281,653.46	2,776,937.85	2,867,807.53	3,349,897.25	3,753,773.02	4,274,027.76	5,208,087.44	5,591,590.38	6,517,885.55	7,767,287.90	8,280,287.90
165,000.00	350,000.00	373,100.00	26,000.00	20,250.00	14,750.00	14,750.00	361,250.00	211,250.00	558,750.00	1,008,750.00	700,000.00
39,790.21	96,732.65	103,361.51	134,396.34	151,631.29	10,597.21	159,258.75	159,784.30	243,273.25	227,066.53	258,889.61	270,318.54
	9,005.00	7,251.00	840.00	166.50	268.50	2,926.57	2,126.92	3,263.45	4,672.01	7,742.15	7,385.56
		100,000.00	200,000.00	250,000.00	250,000.00	250,000.00	225,000.00	106,249.32	147,500.25	93,933.45	72,035.56
9,120.00	19,991.00	30,250.00	52,184.04	78,472.52	123,701.62	183,969.81	251,788.00	296,546.99	351,136.56	417,797.77	491,032.34
61,975.95	91,120.16	124,238.45	161,493.56	199,038.05	237,853.01						
1,465,555.52	1,714,804.65	2,038,736.89	2,292,893.59	2,650,338.89	3,116,602.68	3,663,122.63	4,208,138.22	4,731,007.37	5,228,760.20	5,980,174.92	6,739,515.90
$1,741,441.68	$2,281,653.46	$2,776,937.85	$2,867,807.53	$3,349,897.25	$3,753,773.02	$4,274,027.76	$5,208,087.44	$5,591,590.38	$6,517,885.55	$7,767,287.90	$8,280,287.90

1927 1/31/28	1928 1/31/29	1929 1/31/30	1930 1/31/31	1931 1/31/32	1932 1/31/33	1933 1/31/34	1934 1/31/35	1935 1/31/36
$ 659,734.40	$ 890,397.59	$1,332,332.28	$1,405,961.04	$1,130,286.72	$ 857,497.07	$ 625,310.20	$ 939,782.77	$ 934,079.61
424,100.00	460,000.00	470,000.00	610,000.00	550,000.00	525,000.00	436,000.00	435,000.00	443,500.00
1,888.82	3,975.19	26,816.37	3,220.85	14,553.14	44,644.02	66,100.66	65,617.68	57,250.76
2,615,057.67	2,917,716.55	3,189,396.72	2,812,939.16	2,215,218.27	2,012,375.67	2,161,902.11	2,155,654.07	2,195,301.56
59,000.00	59,000.00	59,000.00	59,000.00	59,000.00	57,000.00	57,000.00	57,000.00	57,000.00
256,114.76	96,820.30	59,435.00	313,391.27	1,036,265.92	1,518,642.98	1,978,999.32	2,199,089.43	2,340,632.49
2,169,687.62	2,318,074.13	2,720,283.07	2,676,061.47	3,073,803.72	3,285,527.08	3,121,890.26	3,072,055.86	3,235,204.77
6,236.39	7,425.08	10,150.89	20,686.18	28,622.17	34,249.25	45,191.58	25,564.23	26,526.18
33,338.64	25,685.23	31,875.79	29,687.74	26,932.68	71,595.24	76,627.51	27,699.32	27,807.93
1,542,129.60	1,501,193.83	1,345,976.63	1,177,489.43	1,358,482.91	1,247,196.34	1,186,333.73	1,082,889.00	999,323.87
7,767,287.90	8,280,287.90	9,245,266.75	9,108,437.14	9,493,165.53	9,653,727.65	9,755,355.37	10,060,352.36	10,316,627.17
1,008,750.00	700,000.00	790,000.00						100,000.00
258,889.61	270,318.54	371,121.96	269,140.49	230,453.33	229,243.90	232,822.88	287,730.15	321,597.16
7,742.15	7,385.56	19,757.11	7,411.70	9,171.47	9,376.37	10,243.26	4,185.86	3,420.65
93,933.45	72,035.56	52,592.97	51,330.42	51,122.01	44,255.43	46,318.48	46,318.48	46,318.48
417,797.77	491,032.34	565,970.45	641,588.99	712,176.68	788,131.46	851,868.96	909,115.64	959,929.16
					74,147.37	84,759.89	84,759.89	84,759.89
							153.60	4,087.76
							100,000.00	200,000.00
5,980,174.92	6,739,515.90	7,445,824.26	8,138,965.54	8,490,242.04	8,508,573.12	8,529,341.90	8,628,088.74	8,594,725.21
								1,788.86
$7,767,287.90	$8,280,287.90	$9,245,266.75	$9,108,437.14	$9,493,165.53	$9,653,727.65	$9,755,355.37	$10,060,352.36	$10,316,627.17

Exhibit 7.

No. of Stores, Sales, Profits '07–'35.

(*Opposite* ☞)

4/29/36

NATIONAL GROCERY COMPANY

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Yr.	Yr. End. Jan. 31	Number of Stores Operated	Over Preceding Yr. Inc.	Over Preceding Yr. Dec.	Gross Sales	Net Profits per Book	Net Taxable Income
1907-	1908	3	-	-	$181028 11	$4584 39	
1908-	1909	11	8	-	267377 56	7968 68	
1909-	1910	23	12	-	601350 44	40806 96	
1910-	1911	39	16	-	975532 76	58601 38	
1911-	1912	57	18	-	1387924 15	74931 22	
1912-	1913	81	24	-	1899315 40	66989 90	$66989 90
1913-	1914	104	23	-	2603211 48	101954 66	101954 66
1914-	1915	134	30	-	3446212 84	173180 81	173180 81
1915-	1916	171	37	-	3924321 68	124451 65	143673 55
1916-	1917	217	46	-	5493394 70	235885 21	276714 75
1917-	1918	268	51	-	8749196 50	584841 59	659558 49
1918-	1919	290	22	-	10623466 32	274249 13	274480 79
1919-	1920	310	20	-	12602935 14	323932 24	323932 24
1920-	1921	344	34	-	15036341 52	254156 70	400061 39
1921-	1922	358	14	-	13542175 60	324908 63	455218 22
1922-	1923	388	30	-	13721399 46	529774 41	623973 67
1923-	1924	448	60	-	15378387 45	584213 53	637611 50
1924-	1925	482	34	-	15973716 30	581745 32	608311 07
1925-	1926	535	53	-	17321525 50	576592 13	561919 04
1926-	1927	625	90	-	19239740 66	565507 90	551389 35
1927-	1928	715	90	-	22125013 40	818043 54	836097 50
1928-	1929	782	67	-	24116343 72	870144 92	842920 05
1929-	1930	799	17	-	26376787 91	806507 32	843916 75
1930-	1931	815	16	-	25142537 41	786466 98	863471 67
1931-	1932	819	4	-	21261618 88	268399 34	152925 43
1932-	1933	815	-	4	18662144 45	147276 51	176284 50
1933-	1934	816	1	-	18151322 23	135053 94	42487 46
1934-	1935	808	-	8	19250911 06	422588 87	456483 80
1935-	1936	792	-	16	18709589 97	220539 84	197391 22

as reported on Federal Income Tax returns

Page Tightly Bound

Exhibit 8.

INFORMATION REGARDING STORES

NATIONAL GROCERY COMPANY — MAY 1st, 1936

Year	Yr. Ending Jan./Feb.	Stores Opened	Stores Closed	Net	No. of Stores in Operation at Close of Fiscal Year
1925	1926	72	19	53	535
1926	1927	90	—	90	625
1927	1928	98	8	90	715
1928	1929	83	16	67	782
1929	1930	33	16	17	799
1930	1931	27	11	16	815
1931	1932	28	24	4	819
1932	1933	8	12	4	815
1933	1934	14	13	1	816
1934	1935	2	10	8	808
1935	1936	5	21	16	792

Exhibit 9.

WAGES AND NUMBER OF EMPLOYEES.

NATIONAL GROCERY COMPANY — APRIL 28, 1936

Year	No. Employees	Total Wages Paid Employees
1924-1925 yr. ending	1462	$ 1,683,947.70
1925-1926 " "	1597	1,873,338.59
1926-1927 " "	1819	2,171,018.69
1927-1928 " "	2041	2,449,278.66
1928-1929 " "	2210	2,825,615.53
1929-1930 " "	2264	2,922,847.30
1930-1931 " "	2332	3,132,891.99
1931-1932 " "	2234	2,932,823.39
1932-1933 " "	2115	2,525,523.37
1933-1934 " "	2022	2,399,544.89
1934-1935 " "	2161	2,506,250.60
1935-1936 " "	2098	2,540,832.28
		$29,963,912.99

Exhibit 10.

Purchases, Discounts, Rents '25–'35.

(*Opposite* ☞)

5/4/36

NATIONAL GROCERY COMPANY E 10

YEAR	ENDING		PURCHASES	DISCOUNTS	RENTS
1925	1/31/26	PURCHASE	13653857.15	157586.10	479780.84
1926	1/31/27	DISCOUNT DED-	15077858.66	168991.45	503044.13
1927	1/31/28	UCTED FROM	17158300.86	185030.60	739514.24
1928	1/31/29	INSTEAD OF	18744424.95	217018.02	878026.79
1929	1/31/30	BEING INCLUD-	20737355.71	201667.15	923841.51
1930	1/31/31	ED AS DISCOUNTS	19993937.83	493719.24	929918.70
1931	1/31/32	PURCHASE DIS-	16761471.48	434114.20	914589.22
1932	1/31/33	COUNT NOT DE-	14774997.00	426801.65	850981.73
1933	1/31/34	DUCTED FROM	14205547.66	319301.26	759154.85
1934	1/31/35	PURCHASES BUT	15038194.89	307966.89	692317.75
1935	1/31/36	ARE INCLUDED IN DISCOUNTS	14818165.52	327333.25	657365.03

Exhibit 11.

NATIONAL GROCERY COMPANY

NOTES RECEIVABLE

(All made by Henry Kohl. No interest ever paid, charged or accrued on the books)

Jan. 18, 1922	$26,000	Int. 6%	26,000	end of fiscal year ending 1/31/22	
Dec. 21, 1922	10,000	Int. 6%	36,000	end of fiscal year ending 1/31/23	
May 8, 1923	23,100	Int. 6%			
May 10, 1923	25,000	" "			
Dec. 14, 1923	5,000	" "			
Jan. 24, 1924	5,000	" "	94,100	end of fiscal year ending 1/31/24	
Mar. 8, 1924	5,000	Int. 6%			
June 18, 1924	15,000	" "			
June 28, 1924	25,000	" "			
Aug. 25, 1924	25,000	" "			
Sept. 29, 1924	155,000	" "			
Oct. 23, 1924	10,000	" "			
Dec. 12, 1924	25,000	" "			
Jan. 5, 1925	10,000	" "			
Jan. 16, 1925	25,000	" "	389,100	end of fiscal year ending 1/31/25	
Jan. 26, 1925	5,000	Int. 6%			
May 9, 1925	10,000	No interest			
June 15, 1925	5,000	" "	409,100	end of fiscal year ending 1/31/26	
Mar. 23, 1926	10,000	No int.			
May 3, 1926	25,000	" "	444,100		
		Pd.	20,000	Sept. 26, 1926; $100 pd. 8/25/32	
			424,100	end of fiscal year ending 1/31/27	
			424,100	end of fiscal year ending 1/31/28	
July 3, 1928	15,900	No Int.	Pd.	8/25/32	
Dec. 26, 1928	10,000	" "	"	8/25/32	
Jan. 22, 1929	10,000	" "	"	8/25/32	
			460,000	end of fiscal year ending 1/31/29	
Dec. 17, 1929	10,000	No int.	Pd.	8/25/32	
			470,000	end of fiscal year ending 1/31/30	
Apr. 21, 1930	30,000	No int.	Pd.	11,000 5/24/33—Pd. 19,000 8/25/32	
June 16, 1930	10,000	" "	"	5/24/33	
Jan. 9, 1931	100,000	" "	"	$60,000 3/17/31—Pd. $40,000 5/24/33	
			610,000	end of fiscal year ending 1/31/31	
Mar. 17, 1931			Pd.	60,000	
			550,000	end of fiscal year ending 1/31/32	
Mar. 15, 1932	25,000	" "	575,000	(Pd. 5/24/33)	
Aug. 25, 1932			65,000	Pd.	
			510,000	end of fiscal year ending 1/31/33	
May 24, 1933			86,000	Pd.	
			424,000	still owing 4/28/36	

Exhibit 12.

Application of Dividends to Loans.

(*Opposite* ☞)

NATIONAL GROCERY COMPANY

MAY 2ND 1936

STATEMENT SHOWING APPLICATION OF DIVIDENDS TO LOANS

DIVIDENDS DECLARED AMOUNT	PAID TO MR. HENRY KOHL	PAYMENTS BY - MR. HENRY KOHL TO NATIONAL GROCERY CO. ON NOTES
DEC. 5TH 1916-$25,000.00	2/3/17 BY CHECK	
APR. 9TH 1918-$25,000.00	4/9/18 BY CHECK	
MAR. 23RD 1931-$100,000.00	3/17/31-$40,000.00 BY CHECK	$20,000.00 (CHECK) 9/4/26 $60,000.00 (BY ENTRY 3/20/31)
		$65,000.00 (LOAN FROM BANK) 8/25/32
DEC. 30TH 1932-$100,000.00	12/30/32 BY CHECK	
MAY 23RD 1933-$100,000.00	5/24/33 BY CHECK	$86,000.00 (CHECK) 5/24/33
MAR. 8TH 1934-$100,000.00	3/9/34-$50,000.00 BY CHECK	
	6/14/34-25,000.00 " "	
	12/10/34-25,000.00 " "	
JAN. 16TH 1935-$200,000.00	1/29/35-$100,000.00 BY CHECK	
	4/18/35-$100,000.00 " "	
JAN. 23RD 1936-$200,000.00	3/14/36-$25,000.00 BY CHECK	
	4/13/36-$75,000.00 " "	
	5/15/36-BALANCE WILL BE PAID.	

Exhibit 13.

BASIS FOR INSURANCE RESERVES YEAR ENDING JANUARY 31, 1931

We credited our self insurance reserve with the following for the period February 1st, 1930 to February 1st, 1931—800 stores.

$3,200 Fire, merchandise and fixtures	@	$18.20	$14,560.00
Public Liability and Property Damage	@	10.00	8,000.00
$1,000 Bond (Fidelity)	@	7.50	6,000.00
$2,000 Burglary, merchandise and cash	@	12.50	20,000.00
		per M	
Hold-up	@	6.60	5,280.00
Plate Glass	@	17.00	13,600.00
Forgery Bond (200M)			1,000.00
Motors against burnout and mechanical accidents			423.54
Full coverage collision on all automobiles			8,933.35
Sprinkler leakage—300 Mercer St. 2½% Co. Inc. clause — stock 500M 2½% or 12,500	@	1.47	183.75
			$77,980.64
Prod. Liability—Premium based on output figures			$ 1,248.37
Mdse. in transit—Premium based on output figures (all risks)			2,510.69
			$ 3,759.06

CAFETERIA

Fire	$ 11.35
Bond	3.75
Burglary	12.50
	$ 27.60
GRAND TOTAL	$81,767.30

Exhibit 14.

Notes Payable 1925–date.

(*Opposite* ☞)

NATIONAL GROCERY COMPANY
NOTES PAYABLE 1/24/25 TO DATE

Yr. Ending	Period	Amount	Rate Interest
1924-1/31/25		350000 00	3%
	2/21/25	150000 00	"
	3/22/25	100000 00	4½%
	10/3/25	100000 00	4½%
	10/31/25	100000 00	"
	11/28/25	300000 00	4½-4½%
	12/26/25	300000 00	"
1925-1/31/26		200000 00	4½-4½%
	8/7/26	600000 00	4½-4%
	9/4/26	600000 00	"
	10/2/26	600000 00	"
	10/30/26	800000 00	4½-4½-4%
	11/27/26	800000 00	"
	12/25/26	800000 00	"
1926-1/31/27		550000 00	4½-4½%
	2/26/27	550000 00	"
	5/21/27	400000 00	"
	7/16/27	250000 00	4½%
	8/13/27	750000 00	4½-3½%
	10/8/27	500000 00	4½-3½%
	11/5/27	700000 00	4½-3½%
	12/31/27	1000000 00	4-4½-3½%
1927-1/31/28		1000000 00	"
	2/25/28	900000 00	"
	3/24/28	600000 00	4-3½%
	4/21/28	400000 00	3½%
	7/14/28	700000 00	4½-4%
	8/11/28	1000000 00	4½-4½%
	12/1/28	900000 00	5½-5%
1928-1/31/29		700000 00	5½%
	3/23/29	500000 00	"
	6/15/29	800000 00	"
	8/10/29	990000 00	"
1929-1/31/30		790000 00	"
	2/22/30	390000 00	"
	3/22/30	190000 00	"
	4/19/30	NONE	
1930-1/31/31		NONE	
1931-1/31/32		NONE	
1932-1/31/33		NONE	
	7/15/33	200000 00	2%
	9/9/33	300000 00	"
	12/2/33	205000 00	"
	12/30/33	100000 00	"
1933-1/31/34		NONE	
1934-1/31/35		NONE	
	11/2/35	200000 00	1½%
1935-1/31/36	3/21/36	100000 00 200000 00	" "

Exhibit 15.

Table to show depreciation shown on annexed sheets.

$2,859,217.25	Market 1/31/30.
479,160.33	Plus securities bought during year.
$3,338,377.58	Total.
269,425.66	Less securities sold (cost) during year.
$3,068,951.92	
2,125,434.50	Market 1/31/31.
$ 943,517.42	Depreciation.

(*Opposite* ☞)

HOLDINGS - JANUARY 31,1930 — NATIONAL GROCERY COMPANY — HOLDINGS - JANUARY 31, 1931

	SECURITY - STOCKS	NO. OF SHARES	PRICE 1/25/30	MARKET VALUE 1/25/30	UNIT COST	COST	PURCHASES AFTER 1/25/30			SOLD BEFORE 1/25/31		NO. OF SHARES	PRICE 1/31/31	MARKET VALUE 1/31/31
	INDUSTRIALS													
(A)	Adams Express Co.	562-1/2	26-1/2	14906	44	24,722.50	3 25	1/10 share				662	21-1/4	14067
	American Can Co.	300	128	38400	119-1/8	35,737.50	12375 00	100 shs		35737 50	300 shs	100	113	11300
	American Cyanamid B.	50	27-1/2	1375	53-1/2	2,671.25						50	9-3/8	469
	American Express Co.	250	210-361	52500	323-1/2	80,862.50						250	177-675	44250
	Allis Chalmers Co.	400	55-1/2	27750	65-1/2	26,220.00						400	36-1/2	14600
	Aviation Corp.	150	5	750	10	1,507.50						150	4-3/8	655
	Aluminum Co. of Amer. pfd.						10925 00	100 shs				100	108½-109	10850
	American Machine & Foundry Co.	35	217-3/4	7621 25	197	6,895.00				6895 00	35 shs			
	Borden Co.	103-45/100	66-1/2	6883	88-1/2	9,154.35		3-9/100 S.D.		-	45/100	106-9/100	69	7320
	Byers A.M.Co.	200	91	18200	141-3/8	28,281.25						200	42-1/4	8450
	Case Co. J.I.	100	224	22400	282	28,195.50	11102 50	50 shs				150	92-1/4	13838
	Chrysler Corp.	200	35-3/4	7150	54-5/8	10,932.50						200	18	3600
	Columbian Carbon Co,	75	179-3/4	13481	182-3/8	13,681.25						75	84	6300
	Columbia Graphophone Co.Ltd.	400	27-7/8	15148	64-7/8	25,952.15						400	8-7/8	3548
	Curtis Aero & Motor Co.	100	no price available		132-1/4	13,225.00						100	no price available	
	Curtis Wright Corporation	300	7-1/8	2136	12-1/2	5,737.50						300	4-1/4	1275
	Cushman Sons Corporation.	150	no price available		212-1/4	31,832.50						150	no price	available
XAXX	Consolidated Electric Sign Co.	-	no price available		-	6,732.26				6732 26	-			
	Commercial Solvents Corp.						12807 50	6 shs S.D. 500 shs				506	18-1/4	9235
	Eastman Kodak Co.						11702 50	50 shs				50	155	7750
	Butterick Co.	500	18	9000	49-3/8	24,805.00						500	15	7500
(B)	Fokker Aircraft Corp.	100	15-1/2-16	1550	41	4,090.00								
(C)	General Aviation Corp.											100	6-5/8-6/7/8	662
	General Baking Common	441	3-5/8	1596								441	5/8	273
	General Baking Co. 8% pfd.	9	123-1/4-123½	1109	00	900.00						9	107-110	963
	General Baking Corp.6% pfd.	126	49	6174								126	29-1/2	3717
(D)	General Electric Co.	100	260-3/4	26075	384-7/8	38,488.75						400	45-1/4	18100
	Gobel Adolph Inc.	200	16	3200	56	11,210.00						200	6-3/8	1274
	Gold Dust Corp.	500	44-3/4	22375	72	35,994.65						500	34-1/2	17250
	Great A. & P. Tea Co.	10	235-1/4	2352	370-1/2	3,705.00						10	210	2100
(E)	Houston Oil Co.	200	58-1/2	11700	97-5/8	19,520.00		80 shs S.D.				880	9-3/8	8250
	Hudson Bay Mining & Smelt.Co.	200	11-1/2	2300	15-7/8	3,170.00						200	4-7/8	974
	International Match Corp. pfd.	200	72-1/2	15100	90-1/4	18,040.00						200	58-3/4	11750
	Journal Square Hotel Corp.units	125	no price available		20	2,500.00				2500 00	125 units			
	Loft Inc.						3075 00	1000 shs				1000	3-1/2	3500
	Marmon Motor Car Co.	300	23-7/8	7161	92-3/4	27,835.00		6 shs S.D.				305	6-1/2	1989
	Montgomery Ward & Co.	500	44-1/4	22125	121-3/8	60,655.00						500	18-5/8	9310
	National Distillers Prod.Corp.						3340 00	100 shs				100	26	2600
	Phelps Dodge Corp.	100	40.	4000	86	8,595.00						100	21	2100
	Petroleum Derivatives Inc.	100	11½ - 13½	1150	61-1/4	6,125.00						100	2½ - 5	250
	Phillips Petroleum Co.						11032 50	300 shs				300	13-3/8	4011
	Radio B. pfd.	100	69-7/8	6987	80-1/4	8,020.00						100	41-1/8	4112
	Radio Corp. common	100	38-1/4	3825	45	4,490.00				4490 00	100 shs			
	Remington Arms Corp.	100	off 30	3000	37-1/8	3,715.00						100	12-15 a	1200
	options in syndicate	TOTAL		379,479.25		634,198.91	76,365.26			56,354.76				251,391.00

HOLDINGS - JANUARY 31, 1931

NO. OF SHARES	PRICE 1/31/31	MARKET VALUE 1/31/31	UNIT COST	COST
662	21-1/4	14067	42-3/8	28,025.75
100	113	11300	123-3/4	12,375.00
50	9-3/8	469	53-1/2	2,671.25
250	177-675	44250	323-1/2	80,862.50
400	36-1/2	14600	65-1/2	26,220.00
150	4-3/8	655	10	1,507.50
100	108½-109	10850	109-1/4	10,925.00
106-9/100	69	7320	86-3/8	9,154.35
200	42-1/4	8450	141-3/8	28,281.25
150	92-1/4	13838	262	39,298.00
200	18	3600	54-5/8	10,932.50
75	84	6300	182-3/8	13,681.25
400	8-7/8	3548	64-7/8	25,952.15
100	no price available		132-1/4	13,225.00
300	4-1/4	1275	12-1/4	5,737.50
150	no price available		212-1/4	31,832.50
506	18-1/4	9235	25-3/8	12,607.50
50	155	7750	234	11,702.50
500	15	7500	49-5/8	24,805.00
100	6-5/8-6/7/8	662	41	4,090.00
441	5/8	273		
9	107-110	963	100	900.00
126	29-1/2	3717		
400	45-1/4	18100	96-1/4	38,488.75
200	6-3/8	1274	56	11,210.00
500	34-1/2	17250	72	35,994.65
10	210	2100	370-1/2	3,705.00
880	9-3/8	8250	22-1/4	19,520.00
200	4-7/8	974	15-7/8	3,170.00
200	58-3/4	11750	90-1/4	18,040.00
1000	3-1/2	3500	3	3,075.00
306	6-1/2	1989	91	27,835.00
500	18-5/8	9310	121-3/8	60,655.00
100	26	2600	33-3/8	3,340.00
100	21	2100	86	8,595.00
100	2½ - 5	250	61-1/4	6,125.00
300	13-3/8	4011	36-3/4	11,032.50
100	41-1/8	4112	80-1/4	8,020.00
100	12-15 a	1200	37-1/8	3,715.00
		259,391.00		657,514.

HOLDINGS - JANUARY 31, 1930 — NATIONAL GROCERY COMPANY — HOLDINGS - JANUARY 31, 1931

SECURITY - STOCKS	NO. OF SHARES	PRICE 1/[illegible]/30	MARKET VALUE 1/[illegible]/30	UNIT COST	COST	PURCHASES AFTER 1/[illegible]/30			SOLD BEFORE 1/[illegible]/31		NO. OF SHARES	PRICE 1/[illegible]/31	MARKET VALUE 1/[illegible]/31	UNIT COST	COST
INDUSTRIALS CONT'D. Carried Forward			339,+[illegible]		674,[illegible]	74,363 25			54,354 76				254,[illegible]2.00		681,[illegible]6
Residuum Reclamation Corp.	25	b		4	101.00						25	o		4	101.00
Richardson & Garrett Bag Com.	130)	no price available		100	13,000.00						130)	no price available		100	13,000.00
Richardson & Garrett Bag. pfd.	130)	no price available									130)	no price available			
Sears Roebuck Co.	101	85	8989	171-1/4	17,300.00		4 shs S.D.				205	49-7/8	5236	169-3/4	17,300.00
Servel Inc.	300	8-5/8	2586	18-1/8	5,437.50						300	7-1/8	2136	18-1/4	5,437.50
Snider Packing Corp.	500	6-1/2-7	3250	29-1/8	14,545.00						500	2-3/4-3	1375	29-1/8	14,545.00
Standard Oil of Indiana	100	53	5300	55-1/2	5,555.00						100	37-1/4	3725	55-1/2	5,555.00
Standard Oil of N.J.	100	64	6400	73	7,305.00						100	48-1/2	4850	73	7,305.00
Stand.Fruit & S.S.Corp. pfd.	300	35-39 &	10500	59-1/4	17,737.50						300	22 - 25 &	6600	59+1/4	17,737.50
Starrett Corp. 6% pfd.	150	38-1/8	5718	51	7,650.00						150	22+-23+	3375	51	7,650.00
Union Carbide & Carbon Co.	216	85	18360	105-5/8	22,825.00						216	60-1/4	13014	105-5/8	22,825.00
United Biscuit Co.	100	41	4100	49-1/8	4,915.00						100	37-5/8	3762	49-1/8	4,915.00
United Aircraft & Trans.Co.	100	50-3/4	5075	110-3/4	11,075.00						100	27	2700	110-3/4	11,075.00
United States Steel Co.	300	179	53700	168-5/8	50,587.50	16525 00	100 shs		50587 50	300 shs	100	148-3/8	14837	165-1/4	16,525.00
Underwood Elliott Fisher Co.	50	110-5/8	5531	117-3/4	5,287.50				5287 50	50 shs					
Vanadium Corp. of America	300	59-1/2	17850	67	20,092.50				20092 50	300 shs					
Wade & Butcher Corp.6% pfd.	34	no price available		100	3,400.00						34	xx		100	3,400.00
Westinghouse Elec. & Mfg.Co.	300	155	46500	170-3/4	51,230.00	6306 25	50 shs		51230 00	300 shs	50	86-1/8	4306	126-1/8	6,306.25
Wood Newspaper Mchy. pfd.) units	100	91-97 ex	4550	130-3/4	10,075.00						100	bid 55 f	2750	100-3/4	10,075.00
Wood Newspaper Mchy. com.)	50										50				
Woolworth F.W. Co.	300	69-5/8	20886	81-5/8	24,476.25						300	57-3/8	17211	81-5/8	24,476.25
PUBLIC UTILITIES															
American Superpower Corp.	1000	26-1/8	15672	59-3/4	35,880.70						600	11-3/4	7050	59-3/4	35,880.70
American & Foreign Power	100	94-1/4	9425	93-3/8	9,332.50						100	31	3100	93-3/8	9,332.50
American Power & Light Co.						10312 50	12 shs S.D.				112	50-7/8	5697	92	10,312.50
Atlantic City Electric pfd.						10700 00	100 shs				100	102½ -105	10250	107	10,700.00
Brooklyn Union Gas Co.	100	142-1/2	14250	237-3/4	23,780.00						100	109½ -111	10950	237-3/4	23,780.00
Consolidated Gas Co. of N.Y	250	108	27000	135-5/8	33,913.75						250	90	22500	135-5/8	33,913.75
Columbia Gas & Elec. Corp.	10	81-3/8	814	23-5/8	236.40		1/2 sh S.D.		236 40	10 shs	1/2	37	16		
Electric Bond & Share common	256-139/200	85-7/8	22051	126	32,352.00		15-139/200 S.D.				272-97/200	44	11989	118-7/8	32,352.00
Electric Power & Light Co.com.						9032 50	100 shs				100	48	4800	90-3/8	9,032.50
Electric Power & Light 6% pfd.						10050 00	100 shs				100	90-3/4	9075	100-1/2	10,050.00
(f) Engineers Public Service	2-4/100	45-1/2	91							8/100					
General Gas & Elec. 6% pfd.	100	88	8800	100-1/2	10,050.00						100	62	6200	100-1/2	10,050.00
Intercontinents Power A.	4-20/43	19-22 g	85				4/45 S.D.				4-24/45	20-23 h	91		
International Utilities B.	500	8	4000	18-1/4	9,112.50						500	7-1/2	3750	18-1/4	9,112.50
(G) International Tel. & Tel.	200	71	14200	130-3/4	26,150.00	8690 00	125 shs				325	26-3/4	8694	107-1/4	34,840.00
National Power & Light Co.	100	35-1/2	3550	34-5/8	3,465.00				3465 00	100 shs					
Niagara Hudson Power Co.	1100	13-3/4	15125	28-5/8	31,552.50						1100	10-3/4	11825	28-5/8	31,552.50
Public Service Corp. of N.J.	5	87-1/8	435	65	325.00	22725 00	200 shs				205	80	16400	112-1/2	23,050.00
Philadelphia Co. 6% pfd.						9925 00	100 shs				100	98-1/2	9850	99-1/4	9,925.00
Total			734,271.25		1,142,964.01	180,629.60			187,253.66				436,906.00		1,139,639.96

HOLDINGS - JANUARY 31,1930 — NATIONAL GROCERY COMPANY — HOLDINGS - JANUARY 31, 1931

	SECURITY - STOCKS	NO. OF SHARES	PRICE 1/31/30	MARKET VALUE 1/31/30	UNIT COST	COST	PURCHASES AFTER 1/31/30		SOLD BEFORE 1/31/31		NO. OF SHARES	PRICE 1/31/31	MARKET VALUE 1/31/31	UNIT COST	COST
	UTILITIES CONT'D. Forward			734,271.25		1,142,964.01	180,629.50		187,253.66				496,946.00		1,139,686.85
	United Light & Power Co.A.	900	37-1/4	33525	59-3/8	53,382.50					900	25-3/4	23175	59-3/8	53,382.50
	United Gas Corp.						4750	200 shs			200	11-3/8	2275	23-3/4	4,780.00
	United Gas Improvt.Co.						4840	100 shs			100	29-1/2	2950	43-3/8	4,340.00
	RAILROADS														
•	Canadian Pacific R.R.Co.	50	199-1/2	9975	167	8,352.50			8352 50	50 shs					
(H)	Cinn. N. O. & Texas Pacific R.R.Co.	30 bid	325 i	9750	458-3/4	13,761.00					30	240-290 j	7200	458-3/4	13,761.00
•	Chesapeake & Ohio R.R.Co.						649				114	43-3/4	4986	30-1/2	3,482.50
(I	Georgia South & Florida R.R.Co.	10	50 - 75 k	500	120-1/4	1,202.50					10 off	15 e	150	120-1/4	1,202.50
•	Hocking Valley R.R.Co.	10	450	4500	283-3/8	2,833.50									
	Virginia Railway	100 off.	150 m	15000	185-1/2	18,550.00					100	110-115 u	11000	185-1/2	18,550.00
	INSURANCE														
	Aetna Life Ins.Co.	100	89-93	8900	146	14,600.00									
(J)	Aetna Fire Ins.Co.	25	580-595	14500	832	20,800.00					100	61-63	6100	146	14,600.00
	American Ins.Co.	200	20½-21	4100	24-7/8	4,975.00					250	51-53	12750	83-1/4	20,800.00
	American Reserve Ins.Co.	50	63-64	3000	91-1/2	4,575.00					200	18-19	3600	24-7/8	4,975.00
	Baltimore Amer.Ins.Co.	400	26½-27	10600	39-7/8	15,950.00		13-2/3 shs S.D.			66-2/3	29½-33	1967	68-3/4	4,575.00
	Equitable Cas. & Surety Co.	130	50 - 60 o	6500	55-3/8	7,200.00	325	65 shs			400	10½-11½	4200	39-7/8	15,950.00
	Eagle Fire Ins.Co.						1375	100 shs			195	2½-4 p	487	38-1/2	7,525.00
	Firemen's Ins.Co.	665	33½-34	22111	45-5/8	30,330.13	7300	200 shs			100	13-13⅜	1300	13-3/4	1,375.00
	Fire Association of Philadelphia	50	36-38 q	1800	52-1/2	2,625.00					865	29½-30½	25517	43-1/2	37,630.13
											50	19-21 r	950	52-1/2	2,625.00
	Great American Ins.Co.	393	33-35	12969	47-1/2	18,647.50									
	Home Ins.Co.	270	45-47	12150	53	14,307.00	4375	100 shs			393	27½-28½	10807	47-1/2	18,647.50
	Hanover Fire Ins.Co.	100	53-55	5300	91	9,100.00					370	35⅝-36⅝	13227	50-1/2	18,682.00
	Home Fire Security Corp.	400	22-24	8800	34-1/2	13,800.00					100	32-36	3200	91	9,100.00
	Insurance Securities Co.	500	18½-19½	9250	27-7/8	13,930.00					400	6½-7½	2600	34-1/2	13,800.00
	National Liberty Ins.Co.	400	18-18½	7200	31-1/8	12,455.00					500	7-7/8	3935	27-7/8	13,930.00
	Peoples Natl.Fire. Ins.Co.	500	18⅝-19	9375	38	19,038.75					400	8-7/8-9-1/8	3248	31-1/8	12,455.00
	Stuyvesant Ins.Co.	240	60-67	14400	120	28,800.00					500	5½ - 6½	2750	38	19,038.75
	Virginia Fire & Marine Ins.Co.	50	100-115	5000	145	7,250.00					240	35-40	8400	120	28,800.00
											50	80-90	4000	145	7,250.00
	INVESTMENT TRUSTS														
•	Alleghany Corp. 5½% pfd.	70	99	6930	100	7,000.00					70	53-57	3710	100	7,000.00
•	Atlantic & Pacific Int.Corp. pfd.	100	25-35 rx	2500	73	7,300.00					100 bid	12-1/4 s	1225	73	7,300.00
	Atlantic & Pacific Int. Corp. com.	102-41/80	13 - 14 t	1333							102-41/80 bid	1-3/4 u	179		
	American International Corp.	2	39-3/4	79							2	20-5/8	41		
	Blue Ridge Corp. pfd.	100	37-7/8	3787	38-7/8	3,890.00					100	31-3/4	3175	38-7/8	3,890.00
	Electric Shareholdings Corp.	5-3/10	19-5/8	98				3/20 S.D.			5-9/20	10-3/8-10-7/8	56		
	Electric Power Associates	100	26-1/8	2612	31-3/8	3,140.00					100	16	1600	31-3/8	3,140.00
	General Realty & Utility 6% pfd.	100	80 - 84	8000	99	9,898.00					100	59-61	5900	99	9,898.00
	General Realty & Utility Common	15	14 - 1/4	214				7 shs S.D.			22	6-1/4	138		
(K)	Haygart Corp.	70	37-42-1/4	2590	47-1/8	3,300.00									
	TOTAL			991,620.25		1,513,957.39	203,743.50		195,606.16				663,704.00		1,522,094.73

HOLDINGS - JANUARY 31,1930 | NATIONAL GROCERY COMPANY | HOLDINGS - JANUARY 31,1931

	SECURITY - STOCKS	NO. OF SHARES	PRICE 1/31/30	MARKET VALUE 1/31/30	UNIT COST	COST	PURCHASES AFTER 1/31/30		SOLD BEFORE 1/31/31		NO. OF SHARES	PRICE 1/31/31	MARKET VALUE 1/31/31	UNIT COST	COST
	INVESTMENT TRUSTS CONT'D. Forwarded-			991.62a.25		1.513.957.39	203.74150		195.60.46				662.704.00		1.522.096.78
*	Insuranshares common	25	bid 23 v	$575							25	bid 1 x	25		
*	Insuranshares pfd.	50	off 55 w	2750	150	7,500.00					50	28-3/4 y	1400	150	7,500.00
	Investment Fund of N.J.	200	7-5/8-3/4	1524	8	1,600.00					200	7-3/8-3/4	1474	8	1,600.00
	New York Investors Corp.	100	22-7/8	2287	49	4,900.00					100	11-5/8	1162	49	4,900.00
(L)	Stone & Webster										1	45-1/2	45		
	Chatham & Phenix Allied Corp.	200	19-7/8	3975	18-1/2	3,700.00					200	15-1/2	3100	18-1/2	3,700.00
	BANKS														
(M)	Beacon Trust Co.	15	50	3750	60	4,500.00			50.00	1/2 sh					
(N)	Atlantic Natl.Bank & Tr.Co.										37	71-1/2	2645 50	120	4,450.00
(O)	American Express Bk. & Tr.						8000	50 shs			50	217-1/2	10875	160	8,000.00
	Bank of America	70	132	9240	230-5/8	16,141.50					70	64	4480	230-5/8	16,141.50
	Bank of United States	340	74	25160	202-5/8	68,907.50					340	2	680	202-5/8	68,907.50
	Central Hanover Bk. & Tr.	50	319-1/2	15975	460	23,000.00					50	251-1/2	12575	460	23,000.00
(P)	Chase National Bank						10.56	8/100 shs			242	100-1/2	24321	182-5/8	44,200.31
(P)	Equitable Trust Co.	260	108	28080	171-1/8	34,235.75			7647.00	60 shs					
(P)	Interstate Trust Co.	256	33	8448	68-3/4	17,601.00									
	Commercial Trust Co. of N.J.	5860	185	1083280	66	386,340.00			3482.50	30 shs	5820	132	768240	65-3/4	382,857.50
	First Natl.Jersey City	472	99-5/8	44840	106-1/2	50,300.50	23400	300 shs			772	50	38600	95-1/2	73,700.50
	Hudson County Natl.Bank	1738	140	243320	78	135,582.19			20900 00	200 shs	1538	83	127654	74-1/2	114,682.19
	Chatham & Phenix Bk. & Tr.	25	123	3075	118	2,950.00					25	79-1/2	1987 50	118	2,950.00
	Com'l.Natl.Bank & Tr.	10	495	4950	82	8,209.00					10	310	3100	82	8,209.00
	Continental Bank & Tr.	100	40	4000	60-1/4	6,025.00					100	23	2300	60-1/4	6,025.00
	Federal Trust Co.	75	119	8925	160-3/8	12,025.00					75	100-1/2	7537 50	160-3/8	12,025.00
	First Natl.Bank Hoboken	128	205	26240	208-1/2	26,687.00					128	120	15360	208-1/2	26,687.00
	Irving Trust Company	400	52-1/2	21000	69-1/2	27,780.00					400	37-3/8	14950	69-1/2	27,780.00
	Manufacturers Trust Co.	95	130	12350	286-1/2	27,211.27					95	45-1/2	4322 50	286-1/2	27,211.27
	Morristown Trust Co.	20	125	2500	154	3,080.00					20	120	2400	154	3,080.00
	N.J.Title Guar. & Tr.Co.	628	165	103620	183	114,909.87					628	96	60288	183	114,909.87
	Seward Natl.Bank	50	122-1/2	6125	227-1/2	11,373.50					50	73-1/2	3675	227-1/2	11,373.50
	Trust Co. of N.J.	680	145	98600	178-1/8	121,126.60					680	86	58480	178-1/8	121,126.60
	State Planters Bank & Tr.	100	48	4800	70	7,000.00					100	39-3/8	3937 50	70	7,000.00
	Bergen Trust Co.	100	no price available		175	17,500.00					100	no price available		175	17,500.00
	Atlanta Trust Co.	50	no price available		160	8,000.00					50	no price available		160	8,000.00
	Nat'l.Com'l.Title & Mtge.	200	17-1/2	3500	32-1/4	6,450.00					200	16	3200	32-1/4	6,450.00
	United States Trust Co.	5	3200	16000	2550	12,750.00			12750 00	5 shs					
				2,779,479.25		2,661,343.07	235,154.06		24.435.66				1.942.518.50		1.676.061.47

HOLDINGS - JANUARY 31, 1930 | NATIONAL GROCERY COMPANY | HOLDINGS - JANUARY 31, 1931

SECURITY - BONDS	NO. OF BONDS	PRICE 1/[illegible]/30	MARKET VALUE 1/[illegible]/30	UNIT COST	COST	PURCHASES AFTER 1/[illegible]/30		SOLD BEFORE 1/[illegible]/31	NO. OF BONDS	PRICE 1/[illegible]/31	MARKET VALUE 1/[illegible]/31	UNIT COST	COST
INDUSTRIALS Caramba Feature			3,779,479.25		1,691,343.07	235,184.06		240,435.66			1,942,518.50		2,676,061.47
Abraham & Strauss Deb.5½-1943	5M	98-1/2-99-3/8	4925	101	5,050.00				5M	94-1/2-96	4725	101	5,050.00
American International Corp. conv.deb.5½-1949	9M	93-1/2	8415	105	9,450.00				9M	93	8370	105	9,450.00
Cities Service Co.5-1950						24937 50	25M		25M	77-3/4	19437	99-3/4	24,937.50
Empire Oil & Ref. 5½-1942						8867 50	10M		10M	78-1/4	7825	88-5/8	8,867.50
General Amer.Investors 5-1952	10M	82	8200	96-5/8	9,660.00				10M	88	8800	96-5/8	9,660.00
Gen'l.Motors Accept. 6-1937						10325 00	10M		10M	103-1/2	10350	103-1/4	10,325.00
National Dairy Prod.5½-1948						9750 00	10M		10M	100-7/8	10087	97-1/2	9,750.00
Pure Oil Co. S.F.5½-1940						9350 00	10M		10M	91	9100	98-1/2	9,450.00
MISCELLANEOUS													
Jersey City Chamber of Commerce Ref.Mtge.5-1975	10M	no price available		100	10,000.00				10M	no price available		100	10,000.00
Roman Catholic Church German Welfare 7-1946	10M	80-83 ad	8000	98-3/4	9,875.00				10M	70-71 bb	7000	98-3/4	9,875.00
PUBLIC UTILITIES													
American Tel. & Tel.Conv.Deb. 4½-1939	20M	141-1/4	28250	145	28,990.00			28990 00 20M					
Associated Gas & Elec. 5-1950						8750 00	10M		10M	76-1/2	7650	87-1/2	8,750.00
Central States Electric 5½-1954	10M	74-1/2	7450	99-1/2	9,950.00				10M	68-1/2	6850	99-1/2	9,950.00
Continental Gas & Elec. 5-1958						8875 00	10M		10M	83-1/4	8325	88-3/4	8,875.00
Intercontinents Power Deb. 6-1948	10M	87-90	8700	96	9,600.00				10M	bid 54 oc	5400	96	9,600.00
Illinois Power & Lt. Corp.6-1953						10400 00	10M		10M	102½-103½ x	y10250	104	10,400.00
Laclede Gas Light 5½-1960						10300 00	10M		10M	103-1/4	10325	103	10,300.00
Middle West Utilities 5-1932						4993 75	5M		5M	99-7/8	4993	98-7/8	4,993.75
Middle West Utilities 5-1933						4942 25	5M		5M	99-1/4	4862	98-7/8	4,942.25
RAILROADS													
Bluff Point Land Impvt.1st mtg.4-40	1M	85-87 dd	850	80	800.00				1M	bid 87-1/2 ee	875	80	800.00
Louisiana & Ark.Rwy. 5-1969						8675 00	10M		10M	69-1/2	6950	86-3/4	8,675.00
MUNICIPALS													
City of New York 4-1/4-1962						25906 25	25M		25M	103-5/8	25906	103-5/8	25,906.25
City of East Orange 4-1/2-1947						26001 99	25M		25M	102½-104½	25625	104	26,001.99
City of Detroit 4-1/2-1960						25990 34	25M		25M	106-107	26500	104	25,990.34
Boro of Glen Ridge 4-1/4-1965						6102 00	6M		6M	107-109	6420	101-3/4	6,102.00
Boro of Glen Ridge 4-1/4-1966						4069 15	4M		4M	107-109	4280	101-3/4	4,069.15
Town of Montclair 4-1/4-1940						10107 33	10M		10M	off 104	10400	101	10,107.33
City of Paterson 4-1/4-1955						25163 81	25M		25M	off 106	26500	100-5/8	25,163.81
GOVERNMENT													
U.S.First Liberty 3½-32-47	5M	98.31	4948	100	5,000.00				5M	102.7	5111	100	5,000.00
GRAND TOTAL			2,859,217.25		2,779,799.07	479,160.33		269,435.66			2,125,434.50		2,999,452.74

Exhibit 16.

Photo of 1st Warehouse.

(*Opposite* ☞)

NATIONAL GROCERY COMPANY
MAZON
COFFEE
NATIONAL
GROCERY COMPANY
WONDER
BREAD
FOR HUMAN NEEDS
Give

Exhibit 17.

Photo of Bakery and Stable.

(*Opposite* ☞)

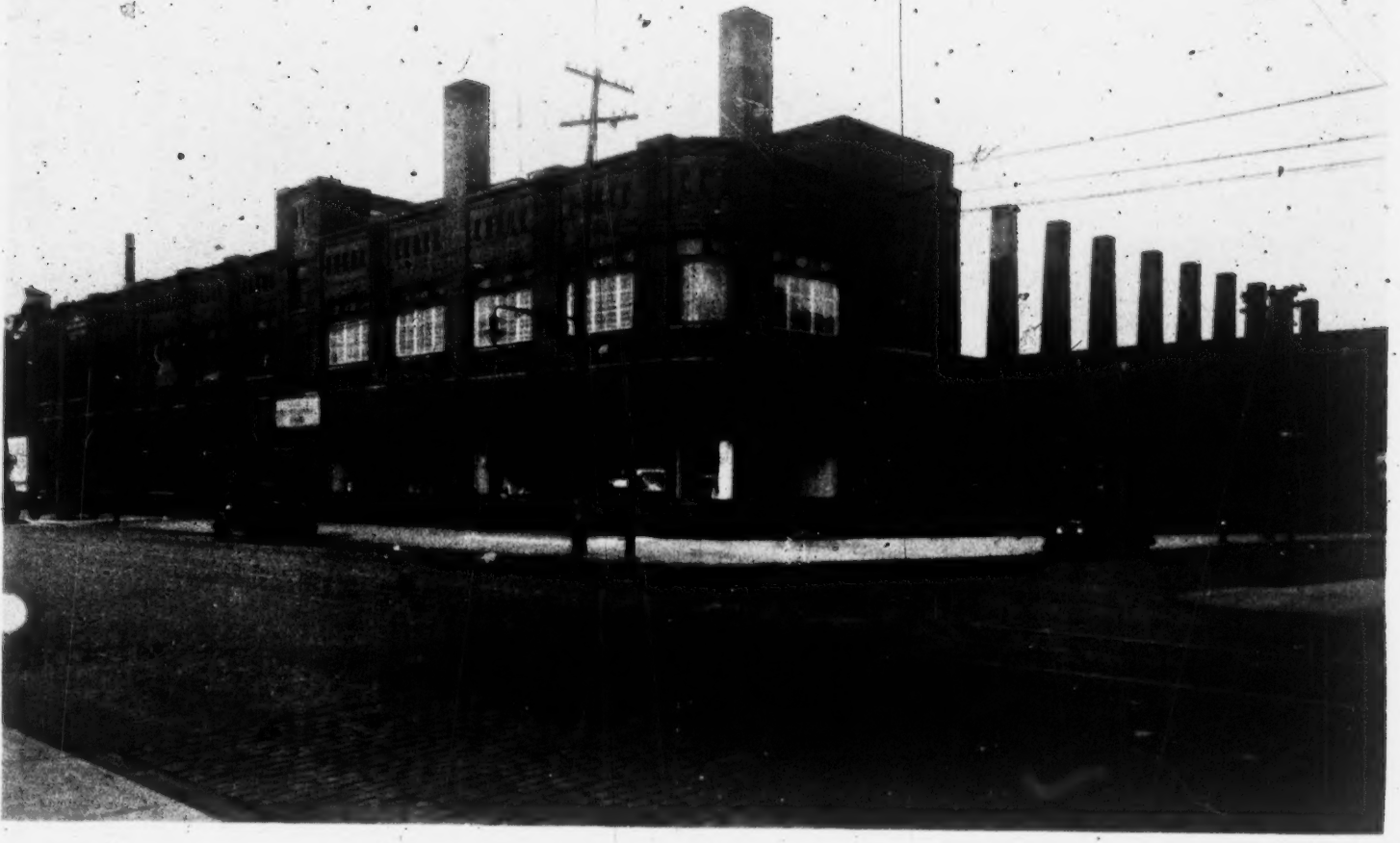


Exhibit 18.

Photo of Office Bldg., Warehouse and Garage.

(*Opposite* ☞)

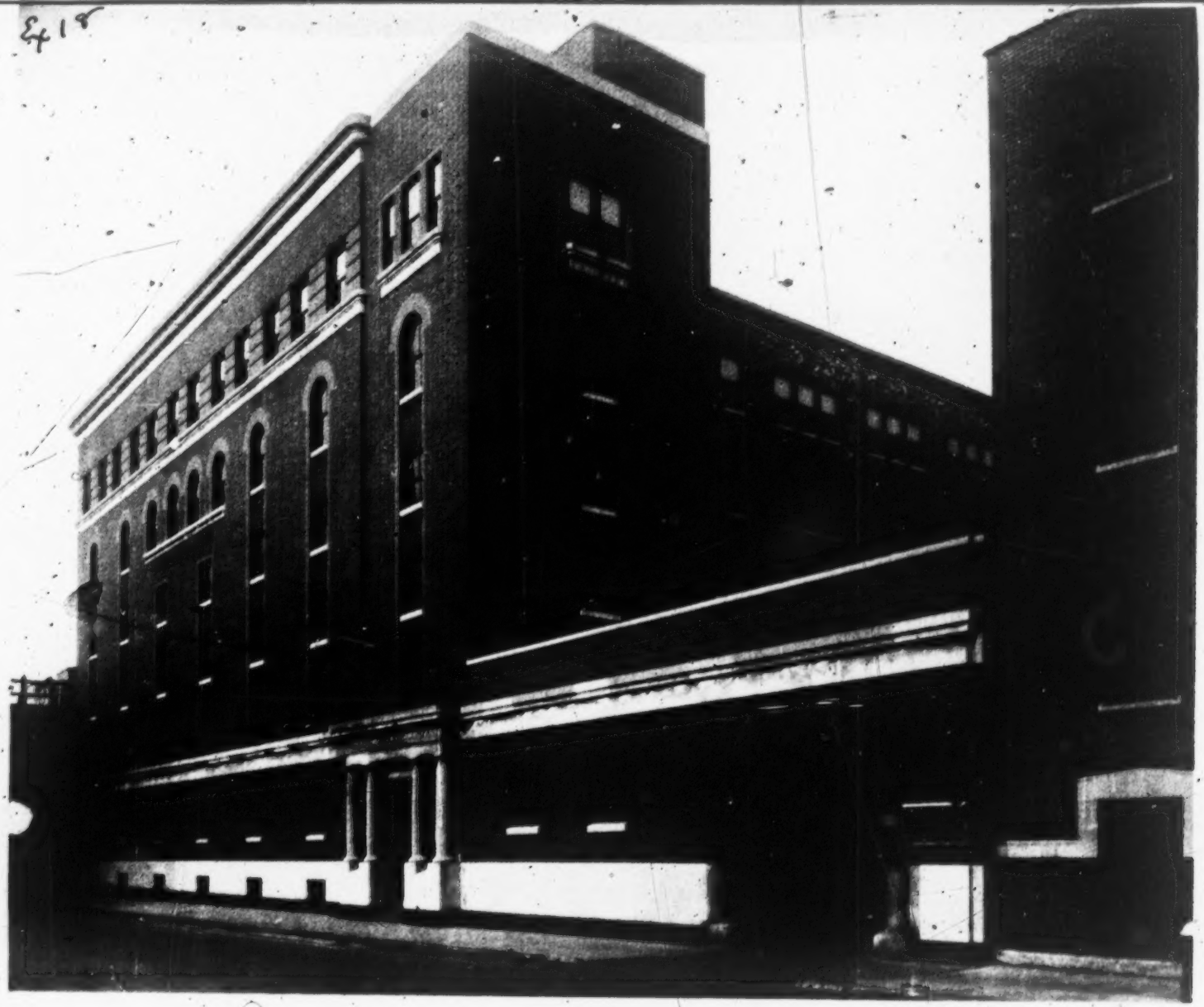


Exhibit 19.

Checks (4) Front and Back.

(*Opposite* ☞)

No. 5964 JERSEY CITY, N.J. Dec 1st 1930

HENRY KOHL

PAY TO THE ORDER OF Young Women's Christian Assn. $500.00/100
Maintenance Fund
EXACTLY $500 & 00 CTS.

To HUDSON COUNTY NATIONAL BANK
55-32 JERSEY CITY, N.J. 55-32

HENRY KOHL
Henry Kohl

No. 5842 JERSEY CITY, N.J. Sept 2nd 1930

HENRY KOHL

PAY TO THE ORDER OF Young Women's Christian Assn. $500.00/100
Maintenance Fund
EXACTLY $500 & 00 CTS.

To HUDSON COUNTY NATIONAL BANK
55-32 JERSEY CITY, N.J. 55-32

HENRY KOHL
Henry Kohl

No. 5688 JERSEY CITY, N.J. May 22nd 1930

HENRY KOHL

PAY TO THE ORDER OF Young Women's Christian Assn. $500.00/100
Maintenance Fund
EXACTLY $500 & 00 CTS.

To HUDSON COUNTY NATIONAL BANK
55-32 JERSEY CITY, N.J. 55-32

HENRY KOHL
Henry Kohl

No. 5617 JERSEY CITY, N.J. April 1st 1930

HENRY KOHL

PAY TO THE ORDER OF Young Women's Christian Assn. $938.20/100
Maintenance Fund
PER SCHED $938.20 AND 35 CTS

To HUDSON COUNTY NATIONAL BANK
55-32 JERSEY CITY, N.J. 55-32

HENRY KOHL
Henry Kohl

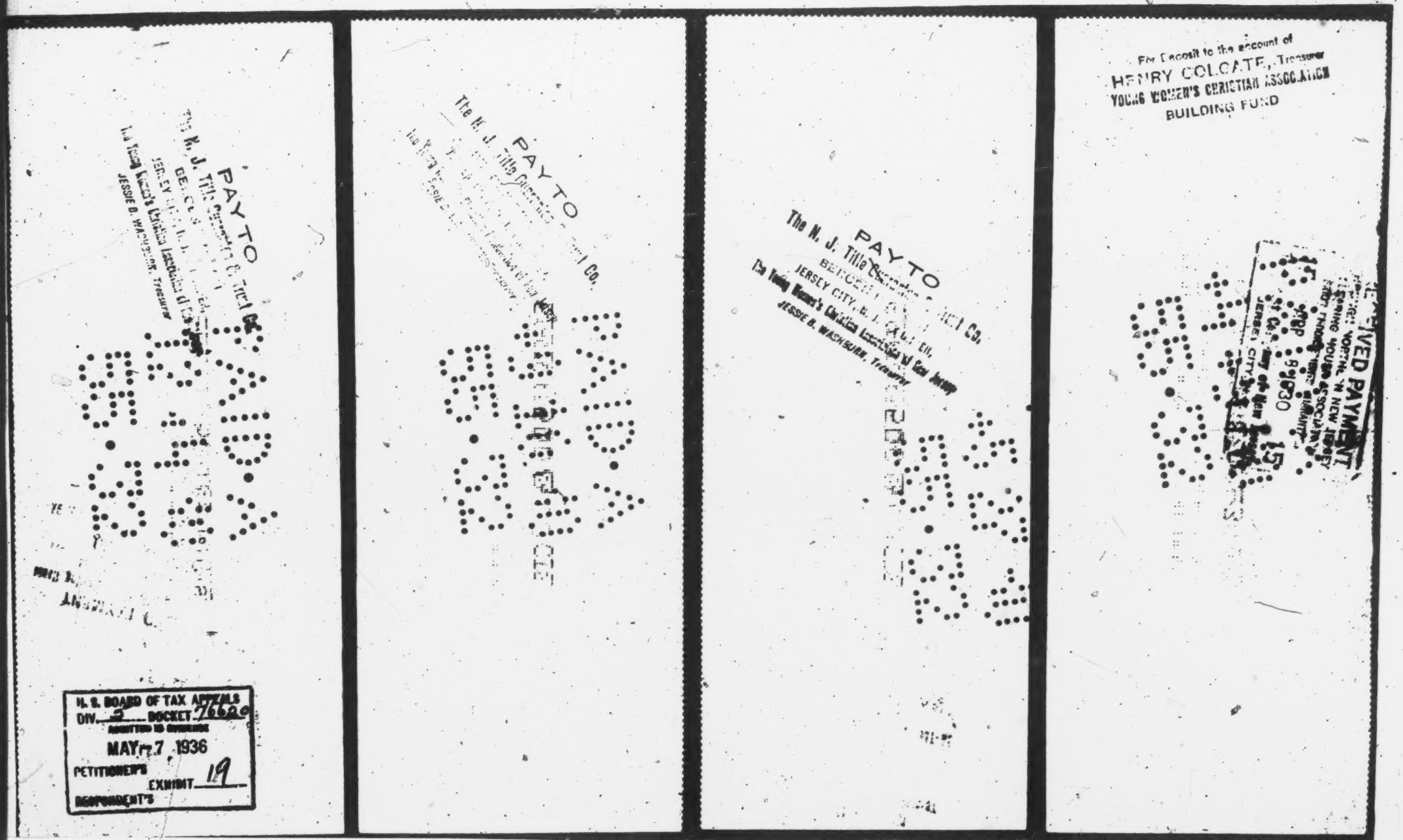

PAY TO
The N. J. Title Guarantee & Mtge. Co.
JESSIE B. WASHBURN, Treasurer
PAY TO
The N. J. Title Guarantee & Mtge. Co.
PAY TO
The N. J. Title Guarantee & Mtge. Co.
JERSEY CITY, N. J.
JESSIE B. WASHBURN, Treasurer
For Deposit to the account of
HENRY COLGATE, Treasurer
YOUNG WOMEN'S CHRISTIAN ASSOCIATION
BUILDING FUND
RECEIVED PAYMENT
JERSEY CITY
MAR 6 1930
U. S. BOARD OF TAX APPEALS
DIV. 5 DOCKET 76620
ADMITTED IN EVIDENCE
MAY 7 1936
PETITIONER'S
EXHIBIT 19
RESPONDENT'S

Exhibit 20.

Checks (2) Front and Back.

(*Opposite* ☞)

No. 5527 JERSEY CITY, N.J. Feb. 15th 1930

HENRY KOHL

PAY TO THE ORDER OF J. L. C. A. (Maintenance Fund 1929) $500.00/100

EXACTLY 500 & 00 CTS.

To HUDSON COUNTY NATIONAL BANK
55-32 JERSEY CITY, N.J. 55-32

HENRY KOHL
Anna L. Mullins

FEB 24 1930
ANDREW C. GREENE

PAY TO
THE N. J. Title Guarantee & Trust Co.
BERGEN BRANCH
JERSEY CITY, N. J. OR ORDER
JENNIE E. RICHARDSON, Treasurer

No. 6044 JERSEY CITY, N.J. Jan. 1st 1931.

HENRY KOHL

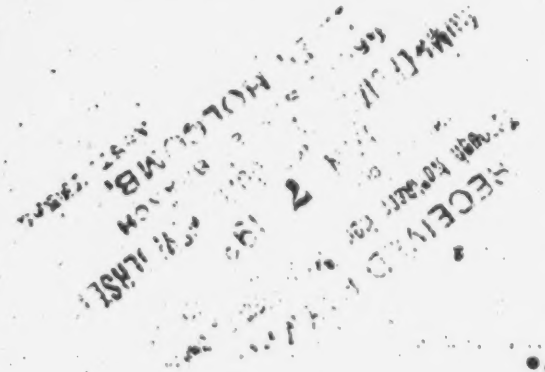
PAY TO THE ORDER OF Commercial Trust Co. Prov. Ft. Rh. $100000.00/100

EXACTLY $100000 & 00 CTS.

To HUDSON COUNTY NATIONAL BANK
55-32 JERSEY CITY, N.J. 55-

HENRY KOHL

Henry Kohl



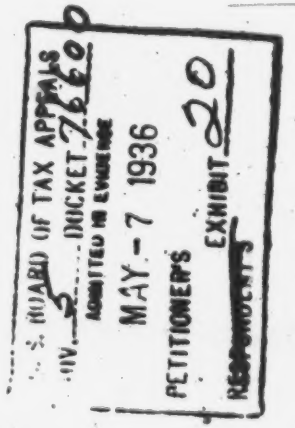


Exhibit 21.

14 Notes.

(*Opposite* ☞)

$25,000 00/100 May 3, 1926

On demand after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

THE SUM OF $25000 AND 00 CTS Dollars

at Jersey City

Value received

1020 Due

Henry Kohl

$65,000 00/100

JERSEY CITY, N.J. DECEMBER 28TH 1932

ONE MONTH- after date I promise to pay to

the order of MYSELF

EXACTLY $65000 & 50 CTS. Dollars.

Payable at HUDSON COUNTY NATIONAL BANK
At Montgomery & Washington Sts.
INTEREST @ 4% JERSEY CITY, N. J.

Value received.

No. 3093 Due

Henry Hohl

$65,000 00/100

JERSEY CITY, N.J. NOVEMBER 28TH 1932

ONE MONTH after date I promise to pay to

the order of MYSELF

EXACTLY $65000 & 00 CTS. Dollars.

Payable at HUDSON COUNTY NATIONAL BANK
At Montgomery & Washington Sts.
INTEREST @ 4% JERSEY CITY, N. J.

Value received.

No. 3023 Due 12-28-32

CANCELLED

Henry Hohl

$65,000 00/100

JERSEY CITY, N.J. OCTOBER 26TH 1932

ONE MONTH after date I promise to pay to

the order of MYSELF

EXACTLY $65000 & 00 CTS. Dollars.

Payable at HUDSON COUNTY NATIONAL BANK
At Montgomery & Washington Sts.
INTEREST @ 4% JERSEY CITY, N. J.

Value received.

No. 2[illegible] Due

Henry Hohl 11/28/32

$65,000 00/100

JERSEY CITY, N.J. SEPTEMBER 26TH 1932

ONE MONTH after date I promise to pay to

the order of MYSELF

EXACTLY $65000 & 00 CTS. Dollars.

Payable at [illegible] NATIONAL
WITH INTEREST AT 4% At [illegible]
[illegible] JERSEY CITY, N. J.

Value received.

No. 2607 Due

Henry Hohl

CANCELLED

Henry Kohl

Henry Kohl

Henry Kohl

Henry Kohl

$30,000 00/100

JERSEY CITY, N.J. APRIL 21ST 1930

ON DEMAND after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

EXACTLY $30000 & 00 CTS. Dollars.

Payable at COMMERCIAL TRUST CO., GROVE ST. BRANCH, JERSEY CITY, N. J.

Value received.

No. Due

J.W. Harrison, 9 Exchange Place, Jersey City, N.J.

$25,000 00/100

JERSEY CITY, N.J. MARCH 10TH 1932

ON DEMAND after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

EXACTLY $25000 & 00 CTS. Dollars.

Payable at 300 MERCER ST., JERSEY CITY, N. J.

Value received.

No. Due

J.W. Harrison, 9 Exchange Place, Jersey City, N.J.

$10,000 00/100

JERSEY CITY, N.J. DECEMBER 17TH 1929

ON DEMAND after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

EXACTLY $10000 & 00 CTS. Dollars

Payable at JERSEY CITY, N. J.

Value received.

No. Due

J.W. Harrison 9 Exchange Place Jersey City N.J.

$10,000 00/100

JERSEY CITY, N.J. JUNE 16TH 1930

ON DEMAND after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

EXACTLY $10000 & 00 CTS. Dollars

Payable at 300 MERCER ST., JERSEY CITY, N.J.

Value received.

No. Due

J.W. Harrison 9 Exchange Place Jersey City N.J.

$40,000 00/100

JERSEY CITY, N.J. MARCH 17TH 1931

ON DEMAND after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

EXACTLY $40000 & 00 CTS. Dollars

Payable at JERSEY CITY, N. J.

Value received.

No. Due

J.W. Harrison 9 Exchange Place Jersey City N.J.

$100,000 00/100

JERSEY CITY, N.J. JANUARY 9TH 1931

ON DEMAND after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

EXACTLY $100000 & 00 CTS. Dollars

Payable at JERSEY CITY, N. J.

Value received.

No. Due

J.W. Harrison 9 Exchange Place Jersey City N.J.

Paid 60,000.00 on account of the note

Drew note for balance

$10,000 00/100

JERSEY CITY, N.J. January 22nd 1929.

On Demand after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

THE SUM OF $10000 AND 00 CTS Dollars.

Payable at Jersey City, N. J.

Value received.

No. Due

J.W. Harrison 9 Exchange Place Jersey City N.J.

$10,000 00/100

JERSEY CITY, N.J. December 28 1928.

On demand after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

THE SUM OF $10000 AND 00 CTS Dollars.

Payable at Commercial Trust Co. Grove Street Branch, Jersey City, N.J.

Value received.

No. Due

J.W. Harrison 9 Exchange Place Jersey City N.J.

$15,900.00

JERSEY CITY, N.J. JULY 3RD 1928 192

ON DEMAND after date I promise to pay to

the order of NATIONAL GROCERY COMPANY

THE SUM OF $15900 AND 00 CTS Dollars.

Payable at JERSEY CITY, N.J.

Value received.

No. Due

Exhibit 22.

2 Notes.

(*Opposite* ☞)

No. 7018 JERSEY CITY, N.J. Sept 26th 1912.

HENRY KOHL

PAY TO THE ORDER OF Hudson Co. National Bank $65000.00/100

EXACTLY $65000 & 00 CTS.

To HUDSON COUNTY NATIONAL BANK HENRY KOHL

33-32 JERSEY CITY, N.J. 33-32

Henry Kohl

No. 6983 JERSEY CITY, N.J. Aug 25th 1912.

HENRY KOHL

PAY TO THE ORDER OF National Grocery Company $65000.00/100

EXACTLY $65000 & 00 CTS.

To HUDSON COUNTY NATIONAL BANK HENRY KOHL

33-32 JERSEY CITY, N.J. 33-32

Henry Kohl

U.S. BOARD OF TAX APPEALS
DIV. 5 DOCKET 76600
ADMITTED IN EVIDENCE
MAY - 7 1936
PETITIONER'S
EXHIBIT 221
RESPONDENT'S

Pay COMMERCIAL TRUST COMPANY
OF NEW JERSEY (GROVE STREET)
Jersey City, N. J.
NATIONAL GROCERY CO.

RECEIVED PAYMENT
through Northern New Jersey Clearing House
PRIOR ENDORSEMENTS GUARANTEED
AUG 25 1930
COMMERCIAL TRUST CO. OF NEW JERSEY
GROVE STREET BRANCH
R. D. HOLCOMB,
ASST. TREAS.

Exhibit 23.

1 Sheet.

Showing Monthly Bank Stock Prices 1930, etc.

(*Opposite* ☞)

HIGH AND LOW PRICES FOR 1930

	JAN H	JAN L	FEB H	FEB L	MAR H	MAR L	APR H	APR L	MAY H	MAY L	JUNE H	JUNE L	JULY H	JULY L	AUG H	AUG L	SEPT H	SEPT L	OCT H	OCT L	NOV H	NOV L	DEC H	DEC L
BANK OF AMER	136	125	134	126	141½	125½	149	138	140	129	130	92	100	95	95	86	104	84	90	74½	75½	65	65	53
BANK OF US UNITS	74	64¾	91	66	84½	77	79	70	70	61	60½	39	43½	40¾	40½	37½	42½	35	36	30	31	13	18½	8
CHASE NAT'L	168	154	171	160	178	159	170	163	169	156	168	120	141½	128	145	132½	150½	129½	133	110	111	97½	101	75½
CHATHAM	123	113	126	124½	140	126	140	134	141	128	138½	98	107	100	107	105	112	99	101	88	88	80	80	69
COMM'L NAT'L	514	465	575	510	600	565	570	523	538	500	540	385	420	360	410	365	435	380	390	280	290	265	294	245
SEWARD NAT'L	124	106	121	114	142	105	138	122	125	108	112	87	92	81	83	82	83	80	85	76	76	68	70	55
AMER EXPRESS	. . . . .		. . . . .		. . . . .		. . . . .		200	170	190	170	220	175	220	. . .	240	220	230	200	215	200	210	175
CENTRAL HAN	321	310	362	318	405	344	405	387	396	373	389	316	365	325	342	316	360	317	322	260	270	236	245	200
CONTINENTAL	42	36	38	30	45½	38	44	37	38	34	36	25	28½	25	29½	25½	29½	23½	24	19	20½	17	17½	13½
IRVING TRUST	56	52½	59	54	74	56	69	62	63	56	59½	45	52½	46½	51½	47½	53½	43½	46½	39	39½	32	37	29½
MANUFACTURERS	140	129	150	129	152	145	148	139	138	126	129½	89	100	93	93½	80	92	78½	80½	64½	68½	49½	49	25
COM'L TRUST NJ							170	168	170	165	155	155	150	148	145	145	. . . . .		140	132	138	136	136	136
N J TITLE							140	140	140	137	136	132	125	123	120	120	. . . . .		115	100	102	100	101 1/2	96 7/8
TRUST CO N J							135	130	125	125	105	105	120	120	. . . . .		107	103	104	103	100	100	87	87
HUDSON CO NAT'L							140	130	125	115	100	90	120	120	. . . . .		110	110	. . . . .		90	90	90	88
FIRST OF J C							100	90	100	90	100	90	100	90	90	75	90	90	90	90	90	90	50	50
FIRST OF HOB	205	205	165	165	180	170	165	170	180	170	165	155	175	160	165	135	155	135	155	135	155	135	140	120
ATLANTIC NAT'L	100	95	98	95	101	101	105	102	100	99	92	90	95	93	95	93	95	93	92	90	89	87	73	70
STATE PLANTERS BANK & TRUST	49	47	50	48½	47	46	46½	45½	45	44	43½	43	44	43½	46	43½	43½	42½	42	40½	41	40	39½	40½
FEDERAL TRUST	121	117	120	115	120	117	125	123	120	117	112	109	112	109	113	109	112	108	105	100	105	100	101	98
MORRISTOWN TR	125	125	125	125	125	125	125	125	125	125	125	125	125	125	125	125	120	120	120	120	120	120	120	120
NAT'L COM'L TITLE & MTGE	17½	17½	17½	17½	. . . . .		. . . . .		. . . . .		. . . . .		. . . . .		18 3/8	18½	. . . . .		. . . . .		. . . . .		16	16

YEARLY HIGH AND LOW PRICES

	1929 H	1929 L	1930 H	1930 L	1931 H	1931 L	1932 H	1932 L	1933 H	1933 L	1934 H	1934 L
AMER EXPRESS	. . . . .		240	170	195	140	. . . . .		. . . . .		. . . . .	
BANK OF AMER	240	131	182	53	71	28	. . . . .		. . . . .		. . . . .	
CENTRAL HAN	475	314	405	200	277	112	162	78	150½	98½	135	100
CHASE NAT'L	*1115 248	918 164	178	79¾	108½	35	48	19	37¾	15¾	71	19½
CHATHAM	*265 198	275 115	141	69	85	15½	21½	17¾	. . . . .		. . . . .	
COM'L NAT'L	905	480	600	245	330	130	188	83	155	99	157	118
CONTINENTAL	*870 93	575 34	45½	13¾	21¾	13	21¾	10¾	19	9	14¾	10¾
IRVING TRUST	*810 90	525 54	74	29¾	43	15	29	11	20	11	19¾	13
MANUFACTURERS	306	135	152	25	54	27½	36¾	15	31½	10½	23½	14¾
SEWARD NAT'L	185	90	142	55	90	58	. . . . .		. . . . .		. . . . .	
BANK OF US UNITS	224	222	91	3/4	3¾	3/4	. . . . .		. . . . .		. . . . .	
COM'L TR N J	220	183	170	132	137	79	87	55	71	28½	48	27½
N J TITLE	201	165	140	96	96	73	68	34	29	9	11¾	6
TRUST CO N J	194	140	135	87	89	45½	51	32½	32	8¾	7	4
HUDSON CO NAT'L	172	132	140	90	85	45	42	25	20½	14	16½	8
FIRST OF J C	110	90	90	50	68	48	25	20	16½	10½	20	14
FIRST OF HOB	205	170	205	120	140	68	60	30	7½	3	5½	2½
ATLANTA TRUST	105	101	. . . . .		. . . . .		. . . . .		. . . . .		. . . . .	
ATLANTIC NAT'L	400	90	105	70	70	28	16½	1/8	. . . . .		. . . . .	
STATE PLANTERS BANK & TRUST	57	45	50	40	40½	24	25	19	18	14½	15	11
FEDERAL TRUST	155	116	122	98	99	63	53	35	40	27	23	14
MORRISTOWN TR	*450 150	400 125	130	120	. . . . .		65	65	29	28	22	22
NAT'L COM'L TITLE & MTGE	25	21	17½	16	16	10	7½	5	2¼	1	1½	1

H & L PRICES JAN. 1931

	H	L
AMER EXPRESS	225	190
BANK OF AMER	66½	62½
CENTRAL HAN	254	249
CHASE NAT'L	102	99
CHATHAM	81	78
COM'L NAT'L	315	305
CONTINENTAL	24½	21½
IRVING TRUST	38 3/8	38 3/8
MANUFACTURERS	48½	44½
SEWARD NAT'L	76	71
BANK OF US UNITS	3¢	3/4
COM'L TR N J	136½	132
N J TITLE	96	95
TRUST CO N J	89	83
HUDSON CO NAT'L	83	83
FIRST OF J C	80	50
FIRST OF HOB	140	120
ATLANTA TRUST	. . . . .	
ATLANTIC NAT'L	73	70
STATE PLANTERS BANK & TRUST	39¢	39
FEDERAL TRUST	102	99
MORRISTOWN TR	120	120
NAT'L COM'L TITLE & MTGE	16	1

* CHASE NAT'L — In May 1929 par value changed from $100 to $20 - 5 shares for one
* CHATHAM & PHEN.IX — In Sep 1929 par valu changed from $100 to $20 - 5 shares for one
* CONTINENTAL BK & TR — In May 1929 par value changed from $100 to $10 - 10 shares for one
* IRVING TRUST CO. — In Aug 1929 par value changed from $100 to $10 - 10 shares for one
* MORRISTOWN TRUST — In May 1932 par value changed from $100 to $25 - 4 shares for one

Exhibit 24.

Large Map.

(*Opposite* ☞)

Penna. R. R.

Waldo Ave. Yard

ACADEMY ST

RAILROAD AVE.

PRIOR ST.

ST.

WAYNE ST.

MERCER ST.

MONTGOMERY ST.

FREMONT ST.

MERSELES ST.

N. J. Junction R.R. Branch

National Docks & (L.V.R.R.)

Passage way

Vacant

1-Brick

Br.

1-Fp

2124
838

Pintch Compressing Co

3 Fireproof Re. Concrete

Mongol Fireproof Re. Concrete

Fan Room

Boiler Room Brick

General Baking Co

Brick

Manhattan Laundry

2123
837

Brick on Floors

General Baking Co

Boiler Room

6

6 & Bas. Fireproof Brick & Re. Concrete

1 Fireproof Brick & Re. Concrete

NATIONAL GROCERY CO.

433
912

3 Fireproof Re. Concrete

Joseph Dixon Crucible Co.

2 & Bas. Brick

2123½
493

John F. Boyle & Co.

1-Frame Iron Clad

2-Frame

1-Frame

Boiler Room

1-Frame Iron Clad

1-Frame

4 & Bas. Fireproof Brick & Concrete

5

NATIONAL GROCERY CO.

1 Frame

2128
836

Central Storage & Realty Co

3 Brick

4

2

1

1 & Bas. Brick

18 Bas. Brick

NATIONAL GROCERY CO.

3

2 Fireproof Brick & Concrete

2 & Bas. Brick

1 & Bas. Brick

2 & Bas. Brick

Prepared By
THE PERCY A. GADDIS, CO.
900 BERGEN AVE.
JERSEY CITY, N.J.

April 4, 1920 W.C.S.

2128 City Block
836 County Block

Exhibit "A"

5/6/36

NATIONAL GROCERY COMPANY

SECURITIES

Year	Yr. Ending	Cost	Market
1927	1/31/28	$2,425,802.38	$3,499,094.33
1928	1/31/29	2,414,894.43	3,353,956.88
1931	1/31/32	4,110,069.64	2,235,071.57
1932	1/31/33	4,804,170.06	2,912,719.45
1933	1/31/34	5,100,889.58	3,095,968.73
1934	1/31/35	5,271,145.29	3,397,310.03
1935	1/31/36	5,575,837.26	4,323,763.75
1929	1/31/30	previously submitted.	
1930	1/31/31		

Praecipe.

UNITED STATES BOARD OF TAX APPEALS

NATIONAL GROCERY COMPANY, body corporate, Petitioner, *vs.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 76600. Praecipe.

To the Clerk of the United States Board of Tax Appeals:

You are hereby directed to transmit to the United States Circuit Court of Appeals, for the Third Circuit, as the record on the appeal in the above entitled cause, the following:

(1) Docket entries.

(2) Pleadings before this Board.

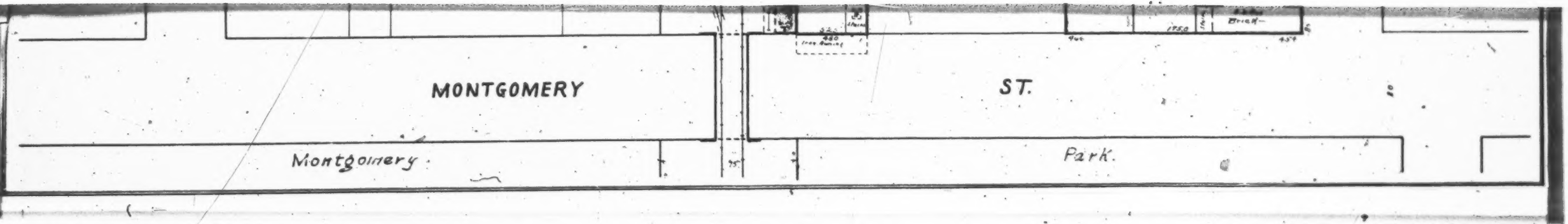
(3) Statement of record before the Board as agreed upon by attorneys for the respective parties, and the stipulation attached thereto.

(4) All of the exhibits on behalf of the petitioner, true copies of each exhibit being handed you herewith, (except Exhibit 3, and as to that exhibit only the Certificate of Incorporation and the Amendments of 1911 shall be included, and the acknowledgments and certifications shall be omitted).

• CHASE NAT'L	In May 1929 par value changed from $100 to $20 - 5 shares for one
• CHATHAM & PHENIX	In Sept 1929 par value changed from $100 to $20 - 5 shares for one
• CONT.MENTAL BK & TR	In May 1929 par value changed from $100 to $10 - 10 shares for one
• IRVING TRUST CO.	In Apr 1929 par value changed from $100 to $10 - 10 shares for one
• MORRISTOWN TRUST	In May 1929 par value changed from $100 to $25 - 4 shares for one

Monthly High and Low Prices for 1930 and Jan. 1931

Bank	Jan.	Feb.	Mar.											
Bank of America	134 - 128	134 - 126	141½-128½	140 - 129	130 - 92	100 - 95	95 - 86	104 - 94	90 - 84½	85½ - 65	65 - 62			


MONTGOMERY
ST.
Montgomery
Park.

(5) Typewritten copy of Exhibit A, and photostatic copies of Exhibits B to K, inclusive, offered by respondent.

(6) Opinion and dissenting opinion of the Board.

(7) Determination of the Board.

(8) Petition for review and assignment of errors.

(9) This praecipe.

Respectfully yours,

JAMES D. CARPENTER, JR.,
Attorney for Petitioner-Appellant.

January 8—1937.

Respondent agrees that the foregoing shall constitute the record on appeal, and waives his right to file a further praecipe.

MORRISON SHAFROTH, JR.,
Attorney for Commissioner of
Internal Revenue.

R. E. S.
1/22/37.

Certificate.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

NATIONAL GROCERY COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 76600.

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 149, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 30th day of January, 1937.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[SEAL]

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 6324. March Term, 1937

NATIONAL GROCERY CO., PETITIONER

vs.

COMR. OF INTERNAL REVENUE, RESPONDENT

Appeal from the Board of Tax Appeals

And now, to-wit, this 28th day of April A. D. 1937, it is ordered that Hon. Oliver B. Dickinson, District Judge for the Eastern District of Pennsylvania, be, and he is, hereby assigned to sit in above case in order to make a full court.

JOSEPH BUFFINGTON,
Circuit Judge.

(Endorsements:) Order Assigning Hon. Oliver B. Dickinson for Argument Received & Filed Apr. 28, 1937. William P. Rowland, Clerk.

United States Circuit Court of Appeals for the Third Circuit

No. 6324. March Term, 1937

NATIONAL GROCERY COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

And afterwards, to wit, the 28th day of April 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington and Honorable John Biggs, Jr., Circuit Judges, and Honorable Oliver B. Dickinson, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 21st day of October 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

United States Circuit Court of Appeals for the Third Circuit

No. 6324. March Term, 1937

NATIONAL GROCERY COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Upon Petition for Review From the United States Board of Tax Appeals

Opinion

(Filed October 21, 1937)

Before BUFFINGTON and BIGGS, Circuit Judges, and DICKINSON, District Judge

BUFFINGTON, *J.*: This case concerns the compulsory distribution and penalizing of corporate profits accumulated in excess of reasonable reserves and with intent to avoid surtax taxation. The statutory authority to impose the taxes rests on the Revenue Act of 1928, c. 852, 45 Stat. 791. Eight members of the Tax Board united in an opinion imposing the tax here involved, while seven others united in a dissenting opinion.

Turning first to the above cited act, we note it provides:

"SEC. 104. Accumulation of Surplus to Evade Surtaxes.

"(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

"(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business shall be prima facie evidence of a purpose to escape the surtax."

Since the taxpayer corporation in this case was created some years before the statute was enacted, it will be seen the warrant for imposing the tax and penalty is, first, that such antecedent corporation was, after the act was passed, "availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed," and secondly, that the fact "that the gains or profits are permitted to accumulate beyond the reason-

able needs of the business, shall be prima facie evidence of a purpose to escape the surtax."

The taxes here involved are for the year 1930, and from the above quoted terms of the law it is clear that Congress did not force the distribution with penalization of all corporate profits but only where the profits "are permitted to accumulate beyond the reasonable needs of the business." Such being the conditions warranting taxation, it follows that the basic question is whether the profits here involved were accumulated beyond the reasonable needs of its business. If this basic fact is established, then, and then only, is such accumulation by the statute made "prima facie evidence of a purpose to escape the surtax."

Turning now to the facts of this case, we note the Government called no witnesses and the proofs of the taxpayer were not contradicted. The case is clear of fraud or proof that the corporation was actuated by any purpose "of preventing the imposition of the tax upon its shareholders."

The uncontradicted proofs show that Henry Kohl, a foreigner, came to America in 1887 and was without money or property. He worked as a clerk in grocery stores for three years. By that time he had saved $217 and in 1891 became half owner in a $500 store and later on in a $250 additional one. Subsequently the partnership was ended by each partner taking one store. Thereafter Kohl bought two additional stores and was the first to use trading stamps in grocery stores. He drew nothing from his business save a bare living. In 1906 he incorporated his three stores under the name Henry Kohl Company and did business until 1911. The interesting story of the development of his business is best told in his own words.

The proofs show that dividends were declared in 1933, 1934, 1935, and 1936. None was declared in 1930, the taxable year here in question. The company accumulated bonds and stocks aggregating $2,989,452.74, which at the end of that taxable year had shrunk by more than $943,517.42. As bearing on the question of avoiding taxation it will be noted the company was in a position, if it sought to escape taxation, to have sold these securities and established a deductible loss. In that regard Kohl testified, "I did not refrain from paying dividends in the National Grocery Company in 1930 in order to avoid the payment of any government tax. I have never done that." Bearing on the corporation acquiring and holding some $2,900,000 of securities, in answer to the question, "Why did the corporation make investments in all these different kinds of stocks and bonds?" the witness testified, and as we have seen without contradiction, as follows: "To invest that money so that when we would need it we would have it. All corporations do that more or less. . . . We wanted to use it all the time. It was invested because we wanted to have the cash on hand. And those were the days there was very little investment. We had to have the money ready. What will you do with it if you don't invest it? . . . It was part of our business. We carried that money, of course, principally to have

the money on hand and get something for it. At the banks you would only get 2 per cent at that time. Of course, you don't get anything now. So we bought some stocks and bonds which we could turn over. You know, you can turn that stuff over in the morning, in a couple of hours, and you have your money if you want it. The money was invested that way so that whenever we needed the money we could sell the securities and get the money. All corporations do that." The proofs make it clear that Kohl was, so to speak, obsessed with the idea of store acquisition and this was the keynote of his actions and business life. To use a homely phrase, his plan was to acquire more stores by "plowing back" into his expanding business the profits his company made. Had he followed this course as an individual business man, instead of doing so as the sole owner of the stock of his corporation, such a course would not have subjected him to this tax. That the growth of this great business was the dominant purpose of all he did is proven by the—again uncontradicted—proof of the treasurer of the company who had worked with him for nearly forty years:

"It has been Mr. Kohl's policy from the formation of the business that he could make more money by reinvesting the earnings in the business than in any other type of investment. The reason the National Grocery Company invested money in a diversified list of stocks and bonds, was because the cash was always available when it was invested in that type of securities, and meanwhile was earning money. The Company has never been financed or expanded through borrowed money. We have never borrowed money except on short term borrowings. The Company has never sold any stock or bonds to the public. All the expansions of the business have been out of earnings. I am one of the stockholders.

"When Mr. Kohl had one store, he promised me he would have ten some day. After he had ten and he thought if I would stay a little longer maybe he would have a hundred, and that has always been his policy right along. Then as the money accumulated there was some competition that was troublesome and he expressed a desire to be able to buy them out some day.

"I believe in 1919 we had two hundred stores. At that time Mr. Kohl was figuring on having a thousand. When he got up to six and eight hundred stores his plan was to have two thousand stores. Our present warehouse was built to take care of between 1,500 and 2,000 stores. The present warehouse was built in the late twenties, and is a six-story building. The bakery would supply probably one thousand stores in its capacity when built, but we are in process of rebuilding that now in order to put in modern machinery to take care of the stores that we hope to open. When the present machinery is installed it will double our present output. As far as the size of the building goes, the ovens and machinery will supply fifteen hundred stores."

In addition to the decline in securities value in 1930, aggregating some $943,517.42, the proof is that the company's merchandise shrank

in value well on to a quarter million dollars, and the real estate declined in value one hundred and twenty-five thousand dollars. Moreover, the shares of stock in five large New Jersey banks—the company had over 8,000 shares—were unsalable during the year of bank closing, and, to use the words of a dealer, "None of the local bank stocks could have been sold on January 1, 1931. The market for bank stocks entirely disappeared in the latter part of October, November, and December 1930. They could not have been sold. They had no market value at that time." Armbruster, an experienced bank stock dealer, referring to the bank stocks owned by the National, testified: "The bank stocks could not have been liquidated in January 1930, because we had declared a condition which started around the middle of December 1929, and ended about April of 1930, where you could not trade in any of the stocks of the five large Jersey City banks."

While the personal credit of Mr. Kohl and his company built up through years, was such that, as conceded by these witnesses, the credit of the company would not have been impaired by the declaration of dividends which were suspended during 1930, yet their uncontradicted proof also is that by following the course of prudence during this panic year the surplus accumulated was not "beyond the reasonable needs of the business."

Turning then to the basic question whether the retention of its available cash in this panicky condition of the company in 1930 was reasonable, we have the testimony of other outsiders. William J. Field, president of a large local bank, former president of the New Jersey Bankers' Association, and with knowledge of the National Grocery Company, when asked whether in his opinion the capital and surplus of the National Grocery Company for the calendar year ending January 31, 1931, was in excess of the reasonable needs of the business, testified:

"I don't think it was in excess of reasonable requirements and reasonable safety of the business. The working capital at the end of 1930 was $3,700,000 odd. The working capital at the end of January 1931 was $4,500,000. We were starting on a panic or panicky conditions. No one could foretell the future at that time. The National Grocery Company had a turnover of from six to eight times its capital in the volume of business it did in those years. It is true that some of the other chain stores in the grocery lines had a turnover of from 10 to 12 per cent, but the National Grocery Company showed a much safer condition by turning over at a smaller percentage than the other companies. They had experience in previous years of rather large losses on inventory, and naturally they should keep a considerable working capital and a surplus to meet any additional losses they might encounter. . . . This company had accumulated a surplus, a good part of which was invested in stocks and bonds. After the depression, in 1929, these securities went off very considerably in market value. Many of them were what was known as over-the-counter securities. There was a large proportion of bank stocks

and it was found they went off in market value, bank stocks outside of New York City could not be sold even at the so-called market value in those times—the conditions that prevailed with bank stocks or stocks of banks located outside of New York City."

Frank C. Ferguson, president of the Hudson National Bank, after examining the balance sheets, statement of profits, and the exhibits in the case, testified:

"In my opinion for the year ending January 31, 1931, the surplus of the corporation was not in excess of the reasonable needs of the business. In my opinion it was good, sound business practice for the Company in that year not to declare any dividends, because in view of the times it was important to conserve all cash resources.

"I am familiar with the inventory of securities owned by the National Grocery Company in the year ending January 31, 1931. For the purposes of the business you would have to eliminate entirely from the statement of the National Grocery Company all the shares of stock in Jersey City and Hoboken banks, because they had no liquidity."

When asked what effect the depression had on the salability of local bank stocks, Mr. Ferguson testified:

"For a time we tried to peg the market and found it impossible. Had to let the market go. I could not sell the bank stocks of these banks with the possible exception of the Commercial Trust Company, which always maintained somewhat of a market. But the rest of the stocks, including my own bank's stock, were absolutely unsalable at any time in this period.

"As I have already stated, those securities could not have been sold nor could they have been used as collateral securities for a loan."

Yet in view of this enormous depletion and shrinking of assets, the Commissioner—and the Board following his lead—in addition to the $103,616.60 income tax paid by the corporation, assessed an alleged deficiency of $477,360.68 here involved. We find in the record no justification for the Board so doing, and it is clear the Board did not pass on the uncontradicted proofs given by the taxpayer, but based its action on the report of an investigator. Indeed, in its opinion the Board says:

"In his deficiency notice the respondent stated:

"After careful consideration of your protest dated July 19, 1932, and subsequent information furnished this office, the Bureau approves the revenue agent's conclusion that in accordance with the provisions of section 104 of the Revenue Act of 1928 your company has permitted its gains and profits to accumulate beyond the reasonable needs of the business instead of being distributed, which is construed as prima facie evidence of a purpose to prevent imposition of surtax upon its stockholders."

To our mind, this does not meet the statutory requirement. On what was the right and statutory duty of the revenue agent based? Did he have the evidence we have quoted before him? What statutory effect does his report have? The fair market value of the

securities owned on January 31, 1931, was $2,125,434.50 as against their cost of $2,989,452.74. The Board, by its own statement, considered "subsequent information furnished this office," and approved "of the Revenue agent's conclusion" and made this its warrant for imposing this tax. It construed this as prima facie evidence of a purpose to prevent imposition of surtax upon its stockholders. Acting on this foundationless prima facies, the Board drew the legal conclusion that "we are also of opinion that the evidence of record does not rebut the prima facie presumption created by the statute." This, to our mind, was a nonsequitur. The basic thing was for the Board to itself determine whether the "profits are permitted to accumulate beyond the reasonable needs of the business" and thereafter, and only thereafter, does the prima facies arise of the purpose to avoid surtax taxation. For aught that appears in the record the Board made no such finding as the Act requires, and this notwithstanding its attention was called thereto in the dissenting opinion: "It may, or may not, be significant that the respondent did not categorically find that the petitioner was 'availed of' for the interdicted purpose; but such finding must be made by the Board if it is to approve the deficiency. * * * The respondent offered no evidence, except a statement of the cost and market value of the securities prepared from the books of the petitioner and its sole stockholder." Indeed, in 82 Fed. (2d) 965 (certiorari denied in 298 U. S. 680), it was held that "so far as the finding by the Board is concerned, the facts are admitted and the finding is not a finding of fact at all but a mere conclusion which the facts do not support." In that connection see also Commissioner v. Rankin, 295 U. S. 123; The Ernest H. Meyer, 84 Fed. (2d) 496; and Tex-Penn Oil Co. v. Commissioner, 83 Fed. (2d) 518, where it is said:

"The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the Board."

With this lack of fact proof thus called to the Board's attention, it called no witness to testify but stood on the report of the revenue agent and the "subsequent information furnished this office."

This case, as we have said, involved no fraud or concealment. For twenty years before the Revenue Act was passed this taxpayer followed the lawful and prudent policy of "ploughing" its earnings into the expansion of its business. The expansion of its business increased its risks, and the accumulating of the earnings of profitable years was its bulwark against fires, earthquakes, floods, wars, depreciation, depression, protracted and costly strikes, boycotts, the preventing of employees from working, and the many unforeseen and unlooked for adversities to which business is subject. In this case we have the uncontradicted testimony that this great business needed the surplus it maintained. With its experience in the taxable year of 1930, with $900,000 shrinkage in its securities; with nearly a

quarter of a million dollars depreciation in its merchandise and $125,000 in its real estate, and with the market for its large bank stock holdings non existent, what man familiar with the conduct of large business operations can say it was unreasonable for the company to protect itself against emergencies? No one was called to the stand to prove the contrary and the ex parte opinion of a revenue officer, with no proof of his knowledge, ability or experience in the conduct of such a business, was no proof at all.

Without entering into further details, we limit ourselves to holding that the Tax Board had before it no proof, substantial or otherwise, to support its imposition of this penal tax. Its judgment is, therefore, reversed.

Biggs, Circuit Judge, dissenting:

I must respectfully dissent from the majority opinion of the court.

The statute under which the deficiency was here found by the Board of Tax Appeals is set forth in haec verba in the majority opinion. The penalty required by the statute may be imposed only if the corporation is found to have accumulated an unreasonable surplus with the purpose of permitting its shareholders to escape surtax. United Business Corporation of America v. Commissioner, 19 B. T. A. 809, affirmed 62 F. (2nd) 754, certiorari denied, 290 U. S. 635. The ultimate question therefore before the court in the case at bar is, did the corporation accumulate an unreasonable surplus with the purpose of enabling its sole stockholder to escape surtax?

The statute creates a presumption of such a purpose upon the part of the corporation if its gains or profits are permitted to accumulate beyond its reasonable needs. Under the statute such an accumulation is prima facie evidence of that purpose in the corporation.

An examination of the authorities convinces me that the effect of the statute creating the presumption, in the case at bar, as stated in United Business Corporation v. Commissioner, supra, is simply to make the taxpayer show its hand; or, not to mix the metaphor, to show its state of mind. In the case of A. D. Saenger, Inc. v. Commissioner, 33 B. T. A. 135, affirmed 84 F. (2nd) 23, certiorari denied, 299 U. S. 577, the Board stated that "the display of that 'hand' does not relieve the taxpayer if it discloses the state of mind the statute condemns."

A state of mind, an intent or purpose may be proved in a number of ways. An accused may state what was in his mind at the time of the commission of the act subject to penalty. Generally such a person makes it plain that his purpose was an innocent one, that he did not possess the mens rea required by the statute. Such statements are received by courts generally with some skepticism since under such circumstances avowals of innocence are much more common than declarations of guilt. The matter of proof generally is not allowed to rest upon the statements of the accused. The possession of the guilty mind or of the guilty purpose may be proven in other ways by other testimony.

In the case at bar the petitioning corporation had one stockholder, Henry Kohl. He had built the business of the corporation from the operation of three stores, to eight hundred and fifteen stores by 1931, the tax year in which the alleged deficiency occurred. He continuously contemplated the purchase or operation of additional units. His every effort was devoted to increasing the size of the petitioner's business.

He drew only sufficient salary to take care of his needs in a frugal manner. The profits of the petitioner, under Kohl's direction, were ploughed back into the business. The minority opinion of the Board and the majority opinion of the Court find the reason for the accumulation of surplus by the petitioner to be Kohl's obsession to create an ever greater chain of grocery stores and that this was the primary reason for the accumulation of the large surplus. Such may be the reason, but such reason is not incompatible with a desire to prevent the imposition of a surtax upon the sole stockholder.

There are other facts. It is a fact that when Kohl was in need of funds he procured them from the corporation by loans, frequently without interest, rather than by the payment of dividends from the assets of the corporation. It was stated in United Business Corporation v. Commissioner, supra, where the court was dealing with loans very similar in their nature to those in the case at bar, "These loans are incompatible with a purpose to strengthen the financial position of the petitioner, but entirely accord with a desire to get the equivalent of his dividends under another guise."

There was such evidence before the Board that it might find, without regard to any presumption, that the surplus of the petitioner was permitted to accumulate beyond its reasonable needs for the purpose of permitting the stockholder to avoid surtax. For example, the profits of the petitioner were very large. For the tax year under discussion that profit was over $780,000.00. In the three years preceding the tax year, the net profits of the petitioner were in excess of $800,000.00 annually. At the end of the taxable year the surplus of the corporation was more than $8,000,000.00: its liabilities were less than $1,000,000.00. Inventories on the other hand never exceeded $3,200,000.00, and accounts payable were never more than $400,000.00. Within the taxable year the petitioner loaned Kohl $140,000.00. The total of all sums loaned by the petitioner to its stockholder from the time of its incorporation until the end of the taxable year was in excess of $600,000.00.

In view of the foregoing it is my opinion that there was sufficient evidence upon which the Board could base the following findings:

"We find as a fact that the petitioner's accumulation of earnings was far in excess of the 'reasonable needs' of the corporate business." and,

"We are also of the opinion that the evidence of record does not rebut the prima facie presumption created by the statute that the accumulation of earnings beyond the 'reasonable needs of the business'

was for the purpose of preventing the imposition of the surtax upon its sole stockholder."

This finding of fact last quoted is inartistically presented, but the words used plainly indicate that the Board found that the accumulation of surplus beyond the reasonable needs of the petitioner's business was to the end that surtax might be avoided by the stockholder. In this connection it should be particularly noted that the loan of $140,000.00 by the petitioner to Kohl within the period of the taxable year did have the effect of permitting the stockholder to avoid imposition of surtax, otherwise unavoidable had the sum been paid to him as a dividend.

One question remains. Are the findings of the Board referred to findings of fact? In my opinion they are such, and, therefore, being based upon sufficient evidence cannot be disturbed. A. D. Saenger, Inc. v. Commissioner, supra; United States v. R. C. Tway Coal Sales Co., 75 F. (2nd) 336; United Business Corporation v. Commissioner, supra; R. & L., Inc. v. Commissioner, 84 F. (2nd) 721; Helvering v. Rankin, 295 U. S. 123, 131.

The judgment of the Board of Tax Appeals should be affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

United States Circuit Court of Appeals for the Third Circuit

No. 6324. March Term, 1937

NATIONAL GROCERY COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby, reversed.

PHILADELPHIA, *October 21, 1937.*

Per Curiam.

BUFFINGTON, *Circuit Judge.*

(Endorsements:) Order Reversing Decree Received & Filed Oct. 21, 1937. William P. Rowland, Clerk.

UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, Third Judicial Circuit, Sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of National Grocery Co., Petitioner, vs. Commissioner of Internal Revenue, Respondent, No. 6324, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 4th day of January in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundred and sixty-second.

[SEAL]

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed February 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1938